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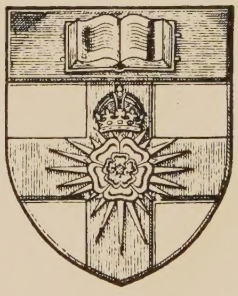

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AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

PEERAGE CASES.

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MEMORANDUM.

OPENING OF THE ROYAL COURTS OF JUSTICE.

On Monday, the 4th of December, 1882, the Royal Courts of Justice were formally opened by Her Majesty the Queen, in the presence of a great and distinguished assembly, including a large number of members of the Bar, and of the Incorporated Law Society.

At the main entrance of the building the Queen was received by the Lord Chancellor (Lord Selborne), Her Majesty's Judges, the Attorney and Solicitor-General, the Prime Minister (Chancellor of the Exchequer), and the First Commissioner of Works (The Right Hon. George Shaw-Lefevre); and was joined by His Royal Highness the Prince of Wales (Bencher of the Middle Temple), His Royal Highness the Duke of Connaught (Bencher of Gray's Inn), His Royal Highness the Duke of Albany (Bencher of Lincoln's Inn), His Royal Highness the Prince Christian of Schleswig-Holstein (Bencher of the Inner Temple), and other members of the Royal family, who had awaited Her Majesty's arrival.

A procession having been formed, Her Majesty was conducted to a dais erected at the north end of the Hall, where the Secretary of State for the Home Department (The Right Hon. Sir W. G. Vernon-Harcourt) took his place at Her Majesty's right hand.

The First Commissioner of Works then offered to Her Majesty the key of the building in the following words:

"May it please your Majesty:—

"Your Commissioners of Works and Public Buildings have been charged with the erection of this building during the last

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eight years. It is now complete. It falls upon me to announce to your Majesty that it is ready to be constituted as 'the certain place' in which, in accordance with the ancient laws of your kingdom, justice shall be administered in the future by your Majesty's Courts."

Her Majesty, having accepted the key, delivered it to the keeping of the Lord Chancellor, and spoke as follows:—

"My Lord Chancellor:—

"I deliver into your charge with this key the care of these Courts of Law. I trust that the uniting together in one place of the various branches of Judicature in this my Supreme Court will conduce to the more efficient and speedy administration of justice to my subjects, and I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the law, will prove in the future, as they have been in times past, a chief security for the rights of my Crown and the liberties of my people."

The Lord Chancellor received the key and, on behalf of himself and the Judges of England, thus addressed Her Majesty:—

"May it please your Majesty:—

"In the name and on behalf of the assembled Judges of your Majesty's Supreme Court of Judicature, I accept the charge which your Majesty has been pleased to lay upon me; and I ask permission to offer to your Majesty the humble expression of our loyal devotion to your Majesty's person and throne, and of our gratitude for the part which your Majesty has been graciously pleased to take in the solemnity of this day. This building, now complete, was authorized by your Majesty with the concurrence of Parliament, in the year 1865, and it has been in progress for more than eight years, under the hands of a great architect, to whom it has not been permitted to see this day. Your Majesty, whose strength of sympathy is so well known to us all, will, I am sure, share the feelings of your subjects when they think of those who are no longer with us—of the architect whom we have lost,

and of that good prelate, venerable as much for his wisdom and virtue as for his great office, from whose lips we might have hoped, not many months since, to hear the Divine blessing invoked upon us to-day. Man passes away, but his works remain. This building, we trust, will remain to a remote posterity, one of the most magnificent public works of the time in which we live. These Royal Courts of Justice, stately enough to satisfy even those who are most accustomed to Westminster Hall, will not, like Westminster Hall, recall the memories of Norman or Plantagenet, of Tudor or Stuart kings; but they will be for ever associated with the name of your Majesty, and with the glories of a reign happy, beyond all which have preceded it, in those qualities of the Sovereign which have caused your Majesty to be so universally beloved and revered, in the advancement of all the arts of civilization, and in the general peace and prosperity of the British people. Among the legislative improvements which have distinguished your Majesty's reign, not the least has been the consolidation and union of the several branches of the Supreme Judicature, which formerly exercised divided jurisdiction. To give full effect to that great change, it was necessary that the different Courts and offices should be brought together in one edifice, fit for the duties which they have to perform. This has at last been done; and your Majesty, by your gracious presence here to-day, has given a signal proof of your care for that justice which will here be administered in your name. It was, indeed, fitting, and worthy of your Majesty, that these Royal Courts should be dedicated to their future use by the Sovereign of these realms, whose noblest prerogatives are justice and mercy, and from whom all jurisdiction within the British dominions is derived. Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, and integrity, in the fear of God, and without fear

of man. That they, and their successors, may be enabled truly to do justice within these walls, as long as the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty."

The Archbishop of York offered up a prayer.

The Queen then declared the building open.

Her Majesty's State Trumpeters, stationed at the north end of the Hall, announced the event by a flourish of trumpets.

The Attorney-General, on behalf of the Bar of England, humbly prayed Her Majesty to direct that the proceedings should be entered upon the records of the Supreme Court.

The Queen, through The Lord Chancellor, signified her royal consent that "it should be done as prayed."

Addresses were then presented to Her Majesty by His Royal Highness the Prince of Wales, accompanied by the four Treasurers, on behalf of the Inns of Court; and by the Lord Chancellor, accompanied by the President of the Incorporated Law Society, on behalf of that society, and the proceedings terminated.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)
1882
Nov. 13.

NOBEL'S EXPLOSIVES COMPANY, LIMITED . . . . . } APPELLANTS;

AND

JONES, SCOTT & CO. . . . . RESPONDENTS.

Patent—User or Exercise—Infringement—Importation and transshipment of patented Article—Custom House Agents.

A patent was granted in England for an invention rendering nitro-glycerine less dangerous. Foreigners imported into England an article compounded of nitro-glycerine and other substances which they had manufactured abroad according to the patent process. The respondents, acting as Custom House agents for the importers, passed the article through the Custom House, and obtained permission (as required by the Explosives Act 1875) for landing and storing it in magazines belonging to the importers:—

Held, affirming the decision of the Court of Appeal, that the respondents being only Custom House agents for the importers, and not themselves the importers, and having neither possession of nor control over the goods, their acts did not amount to an exercise or user of the patent, and that no action could be maintained against them for an infringement of the patent.

APPEAL from an order of the Court of Appeal (James, Baggallay and Lush L.JJ). The facts and pleadings are fully set out

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NOBEL'S EXPLOSIVES COMPANY v. JONES.

in the report of the case below (1). The following is an outline of the facts :—

The appellants were assignees of letters patent granted in respect of an invention for rendering the explosive nitro-glycerine safer in use by causing it to be absorbed in porous unexplosive substances, whereby it was converted into a powder called dynamite or Nobel's safety powder; and they brought this action for the infringement of the patent. Krebs & Co. in Cologne manufactured lithofracteur, which was a compound of nitro-glycerine absorbed in porous unexplosive substances, and the manufacture or use of which was an infringement of the patent. Krebs & Co. consigned cases of lithofracteur to themselves in England, the bills of lading being made out to them. Upon the arrival of the ships with the lithofracteur in the Thames the respondents as Custom House agents for Krebs & Co. passed them through the Custom House and procured the necessary authority under the Explosives Act 1875 (38 & 39 Vict. c. 17), the licenses being made out to Nursey an agent of Krebs & Co. the importers. The cases were transferred from the ships to lighters of Krebs & Co. and from the lighters to magazines of Krebs & Co. Ultimately part of the lithofracteur was sold in England, and part sent back to Cologne. Bacon V.C. granted an injunction against the respondents with an inquiry as to damages. The Court of Appeal reversed this decision and dismissed the action with costs (1).

Nov. 10, 13. *Aston* Q.C. and *E. Cutler* for the appellants :—

The respondents were more than mere agents: they were the importers, and importation is an infringement of the patent: *Von Heyden* v. *Neustadt* (2). But even if not they are liable to an injunction as agents. The transshipment and storage amounted to a user or exercise of the patent within 15 & 16 Vict. c. 83, sched., for the explosive was made less dangerous by the lithofracteur, just as in *Neilson* v. *Betts* (3) the beer was protected by the capsules. That case decides that such acts as the respondents' are an infringement and should be restrained. Krebs & Co. would themselves clearly be liable, and therefore also their agents.

(1) 17 Ch. D. 721. (2) 14 Ch. D. 230.
(3) Law Rep. 5 H. L. 1.

Every one of the agents of a wrongdoer and everyone who takes part in such a wrong is liable to be made a defendant and restrained: *Betts* v. *De Vitre* (1), per Wood V.C. "The infringement of a patent is a tort and all persons who are in any way acting towards it are jointly answerable:" *Betts* v. *Neilson* (2) per Lord Chelmsford. Sending it into England is enough, whatever becomes of the article afterwards. The employment of the lithofracteur to protect the explosive by any person who would incur responsibility or run any risk to property is enough to make that person liable. The acts of the defendants would have been an infringement of an injunction against Krebs & Co. or their agents, if such an injunction had been obtained: and to such an injunction the appellants are clearly entitled.

H. Davey Q.C. and *Goodeve* for the respondents were not heard.

LORD SELBORNE L.C. after reading the allegations in the original and amended statement of claim which are set out in the report of the case below (3) proceeded as follows:—

My Lords, the statement of claim after setting forth the plaintiffs' patent alleges that the defendants have infringed the patent by these acts:—purchases by the defendants from Krebs; importation by the defendants; delivery to themselves, or receipt by them; and transshipment and storage by them, either as owners or as agents, in the port of London. If there was no purchase, if there was no delivery to or receipt by them either as owners or as agents, and no act done by them in the way of control over the goods, all the allegations of infringement fail.

In the Court of Appeal James, Baggallay and Lush LJJ. were all of opinion that the acts proved to have been done were not such acts as are alleged in the statement of claim, and that they were in point of fact nothing more nor less than acts necessary for passing through the Custom House goods belonging to other persons, at the instance of those other persons; and that there was no receipt of the goods by the defendants, no delivery of the

(1) 11 L. T. (N.S.) 535. (2) Law Rep. 3 Ch. 429, 438.
(3) 17 Ch. D. 722, 723, 724, 725.

H. L. (E.) 1882 NOBEL'S EXPLOSIVES COMPANY v. JONES. Lord Selborne, L.C.

goods to them, no dealing with the goods in any sense or manner by them. The ground of the judgment, against the appellants, of James L.J. (1) is thus stated, "Is the mere assisting in getting the goods from the ship into a lighter an actionable wrong? What is actionable, and what the plaintiffs' rights are, is shewn by the letters patent themselves. The rights of the patentee which nobody can infringe, are that the patentee and his assigns and no others may during the term make, use, exercise, and vend his said invention. Can anybody say that going to the Custom House and writing to the Custom House for Krebs & Co. for a warrant to discharge things from a ship into a barge is making the invention? Is it using it? Is it exercising or vending it? It seems to me it is neither making, using, exercising, nor vending the said invention. Krebs & Co., the persons who had the control over it, or the persons who had the possession, may, in one sense, be said to be using it; having regard, as Mr. Aston said, (though I do not think it is necessary for us to determine the point) to the particular nature of the invention in this case, which was one by means of which every drop of the highly explosive thing nitro-glycerine is coated with some other material in such a way as to make it storable, moveable, and transportable with safety." The Lord Justice says further on (2), "Krebs & Co. . . . might be held to be using it. . . . But a man who has no possession of the thing and has no control over it, and who has no dominion or power to deal with it, to whom the safety or the want of safety is not of the slightest consequence, cannot be said to be using the invention; and that is the only way in which it could be said that these letters patent were infringed. And as of course nobody could pretend to say that he was making, exercising, or vending it, it does not come within either of those."

I entirely concur in every word of that passage of the judgment, in which the two other Lords Justices also concurred. And it seems to me that the matter so plainly stated, if it be in accordance with the result of the evidence, makes it unnecessary to consider the ulterior question of law, whether the doctrine laid down as to user in *Neilson* v. *Betts* (3) is applicable to what is

(1) 17 Ch. D. at p. 741. (2) 17 Ch. D. at p. 742.
(3) Law Rep. 5 H. L. 1.

alleged to be user in the present case. I only refer to that question of law for the purpose of guarding myself against being supposed to decide a question which does not appear to me to call for decision in this case. Supposing that this had been a case, not of the dynamite patent, but of Betts' patent, it appears to me that from the acts shewn to have been done by the present defendants it would have been impossible to say that there was any user by them of the capsules. I cannot go upon suspicion; I can only look at the evidence. The burden of proof is upon the plaintiffs, and if they have given no evidence whatever to shew either user by the defendants or possession de facto or constructive possession, it is manifest that, whatever else they did, the defendants did not use these goods. Most assuredly, as the Lord Justice says, they did not make or exercise or vend this invention. They may or may not have been contributing some assistance to somebody who might be open to a charge of infringing the patent. That may, or may not, have been a wrong thing to do; but as they did not directly or indirectly themselves, make, exercise, or use the invention, they did not infringe the patent; and the present action brought against them, and against them only, cannot be sustained.

[After discussing the evidence the Lord Chancellor proceeded:—] In the result the evidence and the documents are to this effect; that from first to last Krebs & Co. were the only persons interested; and that the defendants did nothing whatever but pass those cargoes through the Custom House, doing those acts alone which by law were required for that purpose, and doing them at the instance of and as agents for Krebs & Co., because the defendants were more familiar with the course of the Custom House in such matters, which the legislation as to explosive substances made rather special. That evidence is quite consistent with the single expression in the documents which is fastened upon by the appellants, where Mayer, the defendants' clerk, is described as clerk of the importers. The defendants had undertaken to act as the agents of the importers for the sole purpose of passing these goods through the Custom House, in the course of which process it was that that description was used.

We have nothing to do with the question what would or would

H. L. (E.) 1882 NOBEL'S EXPLOSIVES COMPANY v. JONES. Lord Selborne, L.C.

not have been the liability of Krebs & Co. for the things which were here done. They were the doers of those things as far as the position of owners, or the fact of possession, is concerned, and the only doers. They did indeed employ the agency of the defendants; and agents employed to infringe a patent may, if they do so, though for the benefit of others, be liable in an action for infringement; but this agency was not to infringe the patent. This agency was simply to remove certain legal difficulties in the way of the passage of the goods from the ship in which they were, for the account, and at the risk, of the true importers, Krebs & Co., into a lighter of theirs supplied by them; and nothing whatever was done by the defendants except to comply with certain provisions of the law for that purpose.

I think that the judgment of the Court of Appeal is unquestionably right, and I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. If the plaintiffs had been able to make out that the defendants had done what in the statement of claim they are said to have done, namely, imported and used this patented article, there can be no doubt that they would have been guilty of an infringement of the patent, and that an action at law or a suit in equity could have been maintained against them. The first question is, What are the facts as to what they did?

The plaintiffs' case I understand to be this, that although the witnesses for the defendants, Jones & Co., swear, and distinct evidence is given on their part, that they did no more than cause the three ships to be entered and to pass the Customs, and obtain the necessary leave to allow the explosives to be properly landed, yet we ought upon this evidence and upon surmises and suspicions to hold that that is a false case altogether, that they did a great deal more than that, that they really were importers, bringing in the article for their own use and benefit, and bringing it to shore. That is the first point, and that is a question of fact. The Vice-Chancellor seems to have thought that that was made out. I cannot exactly understand how.

The only piece of evidence that I can see is this. In the Customs' entry which was made (for the goods were to be landed "free entry") it was required, according to some of the provisions I presume of the Customs' Acts (I have not looked at them) that there should be a certificate given, and it is signed in this way, "I, H. Mayer, clerk to the importers, hereby declare the particulars herein contained to be correctly stated. (Signed) H. Mayer." On that it is said that as Mayer was undoubtedly the clerk of Jones & Co., he in giving that certificate called them "the importers," and that therefore we are to assume that they were something more than the persons who, using that name, passed the goods through the Customs. The expression was inaccurate in fact; he should have called himself "clerk to the agents for the importers," which would have been strictly accurate. But it is said that from that expression of his we are to infer that they were actually the importers. I am not quite sure whether the Vice-Chancellor goes so far as that, but he seems to have doubted the truth of the story told by the defendants, there being no other evidence against them at all except that. I cannot agree in that at all; and the Lords Justices seem to have thought that we ought to take the defendants' statements as true.

But Bacon V.C. besides that says (1), "Assuming that all Mr. Mayer and the other witnesses have said to be true, I cannot resist the written and other evidence by which the facts are established that upon the three several occasions the defendants did procure the delivery and transshipment of the goods mentioned; nor can I doubt that such dealing was a user by the defendants in infringement of the plaintiff's rights under the patent." There I must say I cannot agree with the Vice-Chancellor. I agree that whoever in any way "uses, or vends, or exercises" a patented article does commit an infringement on the property of the patentee in that article; and although the present plaintiffs were not originally the patentees, they had on the 23rd of April 1877 become the assignees of the patent, and anything that was done which amounted to a user of the patented article subsequent to that date would be an infringement of their property. I do not think that it would be material, in order to

(1) 17 Ch. D. at p. 735.

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1882
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Lord Blackburn.

support an action for the infringement of their property, to shew that it was knowingly infringed. Whether it was done knowingly or not it would equally be an infringement of their property. But if it was necessary to shew that it was done knowingly, I think there would be strong ground for believing that Jones & Co., who had been partly concerned in the former litigation, knew quite well that this was an article which, as the plaintiffs alleged, and, as it turned out subsequently, correctly alleged, was an infringement of their patent. And accordingly if the defendants had in any way used this article I should have been inclined to support that case.

But what the defendants say, and I think say truly, is this, that they did, at the request of Nursey, who was the agent of the actual importers, the persons who manufactured the article, enter it at the Customs and pass it. It was necessary under the various Acts of Parliament for protecting the revenue, that that should be done. They say, "We did that; we removed that obstacle which was in the way of landing the goods from the ship to the shore." And further under the Explosives Act it was necessary that various precautions should be observed to secure the safety of the public. The defendants did, as agents, apply for and obtain leave that these goods should be landed upon the proper conditions being fulfilled (and it appears that those conditions were all fulfilled) and that is all. The defendants did therefore (to use a figure of speech which I used in the course of the argument) apply for the key to unlock two doors which prevented the goods being landed from the ship in the Thames to the shore; it was that and no more. Can that in any sense of the word be called "using" the patented article? I think not.

Mr. Aston argued that if an injunction had been obtained by the present plaintiffs (it was obtained, not by them, but by their predecessors in title), and they had applied against the present defendants upon the ground that the passing of the ship through the Customs and obtaining permission to land the articles was a breach of the injunction, it would have been held to be a breach of the injunction. I do not say whether it would have been or not; but I do say that that is quite a different thing from bringing a new and substantive action against the now defendants,

that is to say, against persons against whom they had not got an injunction.

I quite agree that when it is a question of the use of a patented article, it is important to see what the nature of the patented article is, for a dealing with the article in a particular way which would have been a use of it if the object of the patent was one thing might not be a use of it if the object of the patent was another thing. In that I agree entirely and I will not enter into the inquiry, which might be rather a nice one, whether, the object of this patent being to render an explosive article less dangerous, less liable to explode than it otherwise would have been, anyone who puts himself in the position of having used the article in that shape might or might not be said to have used the patent. That is a nice question. But what I do say is that Jones & Co., upon this evidence, are not in that position at all. They never used the article itself, they did nothing whatever except take steps to remove the two obstacles which were imposed by the legislature, not for the benefit of the patentee, but in the one case against a breach or infringement of the revenue laws, and in the other case against the danger that the article would explode and do mischief. How, in any sense, taking those steps to remove these two obstacles can be said to be a user of the patent has never been made clear to my mind. I am quite clear that it is not; and consequently the defendants never having been shewn in any way to have used or in any other way to have infringed this patent, I think that the action against them ought not to succeed, and that the judgment of the Court of Appeal should be affirmed with costs.

LORD WATSON:—

My Lords, the only question in this case is, whether there has been a user or exercise of the appellants' patent by the respondents.

The facts of the case, as appearing from the evidence, do not, to my mind, admit of any doubt. Krebs & Co. were the importers of three different parcels of lithofracteur, which were manufactured by them in Cologne, shipped to the Thames under bills of lading in their names, and then delivered to them and placed

H. L. (E.) 1882 NOBEL'S EXPLOSIVES COMPANY v. JONES. Lord Watson.

in their stores at Benfleet. All that the respondents did on the occasion of each of these shipments was to pass the goods through the Custom House on behalf of Krebs & Co. and also to obtain from the proper authorities a warrant for delivery to an owner in terms of the Explosives Act 1875. They never were in possession of the goods, or had any control over them. I assume for the purposes of this case, that the use of the appellants' invention was continuous from and after the time when the lithofracteur in question was made up. It does not appear to me to be necessary to decide that point, because assuming it to be decided in their favour the appellants have, in my opinion, failed to shew that there was any use of their patent by the respondents.

It is not disputed that the lithofracteur was manufactured in terms of the appellants' patent; and, upon the construction of the patent which I have assumed, the respondents might have been held to have used the invention, if the imported article had come into their possession, or even if they had acquired over it a certain measure of control. But I cannot discover a single fact in the connection of the respondents with these transactions of Krebs & Co., which can in any reasonable sense be characterized as a use by them of the lithofracteur or of the appellants' invention.

I have not thought it necessary to express my opinion in this case at any length, because I entirely agree with the observations made by the Judges of the Court of Appeal.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion, and have nothing to add to that which has been said already.

LORD FITZGERALD:—

My Lords, I also concur in the judgment of the House, and have nothing to add.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 13th November 1882.

Solicitors for appellants: *J. & R. Gole.*

Solicitors for respondents: *Woodbridge & Sons.*

[HOUSE OF LORDS.]

THE SINGER MANUFACTURING COMPANY . . . . . APPELLANTS;

AND

HERMANN LOOG . . . . . RESPONDENT.

H. L. (E.)
1882
Dec. 13.

Trade-mark—Trade-Name—Infringement.

A trader has a right to make and sell machines similar in form and construction to those made and sold by a rival trader, and in describing and advertising his own machines to refer to his rival's machines and his rival's name, provided he does this in such a way as to obviate any reasonable possibility of misunderstanding or deception.

APPEAL from a decision of the Court of Appeal (James, Cotton and Lush L.JJ.) reversing a decision of Bacon V.C.

The facts are fully set out in the judgments of the Court of Appeal (1), and of the Lord Chancellor in this House.

Nov. 16, 17, 20, 21, 22, 23. *Aston* Q.C. and *Benjamin* Q.C. (*Rigby* Q.C. and *B. Coleridge* with them) for the appellants (besides contending that the decision of the Court of Appeal was wrong upon the facts and that the respondent used the name "Singer" in connection with his own machines in such a way as to deceive) argued that there was property in a trade-name; that while on the continent the unauthorised assumption of a private name is actionable independently of property, interest, or trade, in England there is property in a name when it is connected with trade or business: *Du Boulay* v. *Du Boulay* (2); that a man may not use his rival's name to bring his rival's customers into his own shop, and then explain that he does not sell his rival's goods (as the respondent in effect did), even though his advertisements may contain nothing to mislead; that a man's trade-name cannot become *publici juris* without his consent; and that whether or not an action will lie for damages caused by a violation of these principles the Court will restrain such conduct by injunc-

(1) 18 Ch. D. 395. (2) Law Rep. 2 P. C. 430, 441.

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tion: *Singer Manufacturing Co.* v. *Wilson* per Lord Cairns (1); *Maxwell* v. *Hogg* (2).

[They also referred to *Wheeler and Wilson Manufacturing Co.* v. *Shakespear* (3); *Liebig's Extract of Meat Co.* v. *Hanbury* (4); *Millington* v. *Fox* (5); *Linoleum Manufacturing Co.* v. *Nairn* (6); *Hall* v. *Barrows* (7); *Croft* v. *Day* (8); *Welch* v. *Knott* (9); *Edelsten* v. *Edelsten* (10); *Seixo* v. *Provezende* (11); *Ainsworth* v. *Walmsley* (12); *Singer Manufacturing Co.* v. *Kimball & Morton* (13).]

The House took time for consideration,

Webster Q.C. *Everitt* Q.C. and *Abrahams* for the respondents being informed that notice would be given if the House desired to hear their arguments.

Dec. 13. LORD SELBORNE L.C.:—

My Lords, the plaintiffs (appellants here) are the same American Company who were appellants in the case of *Singer Manufacturing Co.* v. *Wilson* (1), decided by this House in 1877. They are the successors in business of an American manufacturer of and dealer in sewing machines, named Singer. Mr. Singer was not originally the inventor or patentee of any machines, but he held a license to manufacture and sell them from a patentee named Howe. The plaintiffs succeeded to his business on their first incorporation, in 1863, and they have since carried on a large and successful trade, both in this country and in America. They became proprietors of, or interested in, several patents (some American, some English) for improvements, or supposed improvements, upon the machines manufactured and sold by them. All these patents, however, had expired some time before the acts were done which are complained of in this suit.

The plaintiffs say that the machines which they now make and

(1) 3 App. Cas. 376, 381–393.
(2) Law Rep. 2 Ch. 307.
(3) 39 L. J. (Ch.) 36.
(4) 17 L. T. (N.S.) 298.
(5) 3 My. & Cr. 338.
(6) 7 Ch. D. 834.
(7) 4 D. J. & S. 150.
(8) 7 Beav. 84.
(9) 4 K. & J. 747.
(10) 1 D. J. & S. 185, 199.
(11) Law Rep. 1 Ch. 193.
(12) Law Rep. 1 Eq. 518.
(13) 11 Court Sess. Cas. (3rd Series), 267.

sell, and have for a considerable time past made and sold, are not in any important respect (except that most of them have what is called the "needle and shuttle" action) identical with any sewing machines which were ever patented; and that they have from time to time varied the form and construction of their machines, so that those which they make now are different from those which they, and Mr. Singer before them, formerly made. They allege that the word "Singer," as applied to sewing machines, is understood in the trade to signify machines of their own manufacture (of which there are several known varieties), and nothing else. They have used that word or name on the brass plates or labels which they have affixed to all the machines sold by them. They admit that everybody is at liberty to make and sell machines exactly similar, both in form and in construction, to their own, but they deny the right of any one to use the word "Singer" in any way whatever in connection with machines not of their manufacture. The present action was brought by them for an injunction and damages against the defendant (the agent in this country of a sewing machine manufacturing company established at Berlin), on the ground, as alleged in the 16th paragraph of the statement of claim, that, by "representing sewing machines sold or offered for sale by him as Singer machines," he had "endeavoured to obtain, and succeeded in obtaining, for the machines sold by him some of the reputation attaching to the plaintiffs' manufacture, and had induced" (and, unless restrained, would continue to induce) "purchasers of his machines to believe that the machines sold by him were in fact machines of the plaintiffs' manufacture, or (in the case of purchasers whose attention had not been called to the plaintiffs' firm) to believe that machines sold by him were machines made by the manufacturers of the machines by which the reputation of the name 'Singer' had been acquired."

If the case, so stated, were established, there could be no doubt of the plaintiffs' right to some relief, upon the ordinary principles applicable to trade-marks and trade-names. To a certain extent, the case was established, and indeed was not contested by the defendant. It was not in controversy, that to some of the machines manufactured by the Berlin Com-

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pany and sold by the defendant (exactly similar in form, pattern, and construction to some of those manufactured and sold by the plaintiffs), a brass plate or label, also similar in form, size, and position to the brass plates or labels engraved with the plaintiffs' trade-mark, had been attached; on which brass plate or label the word "Singer" appeared, though associated with other words, which, if carefully read, might inform a customer that the machine was manufactured by the Berlin Company. The defendant, as representative in this country of the Berlin Company (in which character I shall throughout speak of him), was a wholesale dealer only; and all persons who bought direct from him knew that the machines which he sold were of the Berlin Company's manufacture, and not of the manufacture of the plaintiffs. But the machines, bearing those brass plates or labels, though supplied by him to wholesale customers who could not be themselves deceived, would be liable to pass from them, by retail, into the hands of other persons, some perhaps ignorant and unwary, who, seeing upon them a brass plate or label with the same appearances as the plaintiffs', and also having the word "Singer" upon it, might mistake that plate or label for the plaintiffs' trade-mark, and believe that those machines were really of the plaintiffs' manufacture. The principles applicable to such a case are well established, and have been several times recognized and illustrated in your Lordships' House; the most recent authority in this House being *Johnston* v. *Orr Ewing* (1). The imitation of a man's trade-mark, in a manner liable to mislead the unwary, cannot be justified by shewing, either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled.

The plaintiffs have obtained an injunction to the full extent necessary to protect their trade-mark. But the Vice-Chancellor, by whom the action was tried, went further, and also prohibited the defendant (in effect) from using the word "Singer" in any way whatever, with respect to any machines not manufactured by the plaintiffs' company. The Lords Justices, on appeal, thought

(1) 7 App. Cas. 219.

that, when the trade-mark was out of the case, nothing else was shewn by the evidence to have been done, or intended, or likely to be done by the defendant, against which he ought to be enjoined. They therefore discharged that part of the Vice-Chancellor's order which went beyond the protection of the plaintiffs' trade-mark; and the question, upon this appeal, is, whether they were right in doing so.

It is necessary for this purpose to consider what the defendant (representing the Berlin Company) has actually done, beyond the use of the objectionable brass plate or label, which must be taken to have now finally ceased; and what may be reasonably presumed, from the nature of his business and course of dealing, to be the intention, or the probable effect, of what he has done, or is likely hereafter to do. The plaintiffs take exception to the employment of the word "Singer" in a certain manner, in four documents, of which the defendant makes use for the purposes of the Berlin Company's business.

One of these documents is a broad sheet or advertisement, printed on both sides, and headed on one side, "The improved Wheeler-Wilson and Singer systems, manufactured by the Sewing Machine Manufacturing Company, late Frister & Rossmann, Berlin." In this title the words "Wheeler-Wilson," "Singer," and "Frister & Rossmann," are all in large type, and all equally conspicuous. It is divided into two equal parts by an engraving of the Berlin Company's manufactory, in the margin of which the addresses of their agents, in nine continental cities, besides London, are given. Below there follows half a page of letter-press, in small type, in the course of which the phrases "the Wheeler-Wilson" and "the Singer systems" several times occur; and also "our Singer machines, pronounced on unquestionable authority to be superior to the so-called original Singer machine;" also "Wheeler-Wilson's" and "Singer's" in a context evidently referring to the "two systems;" also a statement that "our Singer machines" are made in a way which causes them to work without noise, "contrary to the very noisy Singer machine of our competitors." On the other side of the broad sheet, fifteen different numbers of machines are figured, of which the first ten are described as on the "Wheeler-Wilson system," and the five

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last as on the "Singer system;" and in the middle of that side, to the left, is a "list of attachments given with every Frister & Rossmann machine, Wheeler-Wilson system," and to the right a "list of attachments given with every Frister & Rossmann machine, Singer system."

The second document is a small price list headed "The Sewing Machine Manufacturing Company, late Frister & Rossmann, Limited, 128, London Wall, London, E.C.—Price List, Private." It is divided into two parts, the first entitled "Wheeler and Wilson improved system," the second "Singer improved system." That, except the prices attached, is all.

Of the third document, the title-page is, "Directions for the use of Frister & Rossmann's shuttle sewing machine, on Singer's improved system," the word "Singer's" being printed in large letters, but not more conspicuously than "Frister & Rossmann's." The directions themselves, which extend over sixteen pages, do not contain the word "Singer;" but they are headed "Instructions for use of the family shuttle machine on the Singer system."

The fourth and last document was an invoice given to a witness who purchased one of the defendant's machines, representing himself to be in the trade, in which the article sold was described as "1 Singer hand machine, No. 14."

None of these documents (unless it be the "directions for use") were of a nature or character which, according to the course of the defendant's business, could be intended, or would be likely, to come into the hands of any retail dealer, to whom machines sold by the defendant might afterwards be resold. The defendant's business was, as has been stated, exclusively wholesale; he would not circulate or deliver these documents, or any of them, to any person not "in the trade." Two of them (the price list marked "private," and the invoice, shewing the wholesale prices of the machines sold) were manifestly not addressed to retail purchasers, nor likely, in the ordinary course of the business of any persons who bought the defendant's machines, to be communicated to them.

It was admitted by the plaintiffs' witnesses, and to me it seems clear, that no purchaser of the class to whom alone these documents were issued by the defendant could possibly be thereby

deceived or misled into supposing that the machines sold by the defendant were of the plaintiffs' manufacture, or that the business carried on by the defendant was the plaintiffs' business. All such purchasers must necessarily have understood that the articles which they ordered or bought were manufactured by the Berlin Company, though some of them were made upon a "system" which was called "the Singer system." The invoice is the only document which, even if it had got into the hands of a careless retail purchaser, might (in my opinion) have been reasonably capable of being otherwise understood.

It is, therefore, in my judgment, superfluous to enter into a close comparison between these documents, or any of them, and that Dublin price list of the defendants in the case of the *Singer Manufacturing Company* v. *Wilson* (1), on which Lord Cairns, in this House, made certain observations, from which I in no way dissent. That was a price list, materially different in its form and phraseology from any of these documents, which list in the ordinary course of Messrs. Wilson & Co.'s business (who were retail as well as wholesale dealers), was liable to pass into the hands of ignorant and unwary customers. The present documents (except the "directions"), could not do so, without a deviation from the settled course of the defendant's, and from the natural and presumable course of his customers', business.

It was contended, that the acts of the defendant enabled his wholesale customers to shew these documents to their own retail customers, for the purpose of passing off the goods bought from the defendant as the plaintiffs' manufacture. The answer is, that, unless the documents were fabricated with a view to such a fraudulent use of them, or unless they were in themselves of such a nature as to suggest, or readily and easily lend themselves to, such a fraud, (which in my opinion they were not), the supposed consequence is too remote, speculative, and improbable to be imputed to the defendant, or to be a ground for the interference of a court of justice with the course of the defendant's business. There is no evidence that, in point of fact, any such use was ever made of them. The "directions for use" spoke unmistakably of "Frister and Rossmann's shuttle sewing machine;" and no

(1) 3 App. Cas. 376.

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one, however careless, could read, in that document, the words "on Singer's improved system" without seeing and understanding their context.

The question, therefore, is, whether the defendant, not representing the machines which he sells as of the manufacture of the plaintiffs, but, on the contrary, representing them as manufactured by the Berlin Company, is at liberty to say that he makes them "on the Singer system"? I agree with the Court of Appeal in thinking that he is at liberty to do so, and that by so doing, (if, in substance, he does no more), he infringes no right of the plaintiffs.

The plaintiffs have insisted, throughout this suit, that the words "the Singer system" (so used) are misleading, arbitrary and unmeaning; that there is no system or principle whatever, distinctive or characteristic of any class or classes of machines manufactured either by themselves or by the Berlin Company, to which that term can rationally be applied; and, therefore, that it can only be intended, and can only have a tendency, to deceive. I will assume (without deciding) that, if it were so, this might be evidence of an intention, on the part of the defendant and his company, and those dealing with them, to pass into the general market goods manufactured by the Berlin Company under the denomination of "Singer machines," in order that they might obtain the benefit of the plaintiffs' reputation, and be supposed (more or less extensively) to be of the plaintiffs' manufacture. But, on this point, the contention of the plaintiffs appears to me to be disproved by the evidence. I am satisfied, that the phrase, "Singer system," whether scientific or not, whether exact or loose, is used by the defendant, and by other persons in the same trade, to signify not a figment but a fact.

The defendant, as agent of the Berlin Company, deals in two only of the several varieties of machines which the plaintiffs also make, namely, those styled the "Family" and the "Medium" machines; the "Medium" scarcely, if at all, differing from the "Family," except in size. He also, it must be recollected, deals in other machines, at least as prominently put forward in his advertisement sheets and price lists, which he describes as manufactured on "the Wheeler Wilson system." There are, in fact,

a good many different kinds of sewing machines, well known in the trade, which have come to be described by appellations derived from the names of their original inventors, patentees, or manufacturers; of which appellations "Wheeler-Wilson" is one. Messrs. Wheeler & Wilson (like Mr. Singer) formed a company for the manufacture of sewing machines; and that company, like the plaintiffs in the present case, sought to restrain the use of the name "Wheeler-Wilson" by other manufacturers. It was decided, however, by James V.C. in 1869 (1), that this name "Wheeler-Wilson" had come to signify in the trade, not the particular manufactures of Messrs. Wheeler & Wilson, or of the Wheeler-Wilson Company, but the kind or kinds of machines which they made, the manufacture of which was *publici juris*. The injunction, therefore, asked in that case was refused. Your Lordships have not now to review that decision, nor do I assume either that it was, or that it was not right; but it is part of the history of the trade in those sewing machines, in which the present defendant now deals; and it is manifest, on the face of the defendant's advertisement sheets and price lists, that he has used the words "Singer system" in exactly the same sense, relatively to the plaintiffs and their predecessor in business, in which he uses the words "Wheeler-Wilson system," relatively to Messrs. Wheeler & Wilson, and the company carrying on business under that name.

The defendant's witness, Mr. Newton Wilson (Question 7499), says, "Every sewing machine, as it came into the English market successively from America, came to be known, in the first place by its outward form, and secondly, by the arrangement of parts which constitute that machine; and that arrangement of parts, combined with that peculiar outward form, constitutes a type or class." This is, evidently, what the defendant and others in the trade who use the same phraseology with the defendant, mean by the word "system." In the 9th paragraph of his statement of defence, the defendant avers that the words "Singer system," and "Singer machines," as he uses them, are, and are understood in the trade to be, descriptive of certain special characteristics of outward form and internal construction, which

(1) 39 L. J. (Ch.) 36.

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he there specifies; and this statement is supported (with only, as it seems to me, verbal and immaterial variations), by the evidence of a scientific witness for the defendant Mr. Imray. That witness divides sewing machines into three principal classes; (1), the lock-stitch, working with a needle and shuttle; (2), the chain-stitch; and (3), the double chain-stitch. To the first, or "lock-stitch" type of machines, he says, all those known under the appellations "Howe," "Thomas," "Singer," and "Wheeler and Wilson," belong, and he specifies the distinctive characters of each kind; and (among them) in much detail (Questions 5904 to 5920) those of the machines known (according to him) under the name of "Singer." The names, he says (Questions 5856–7), "always convey to my mind a distinctive idea of a distinct thing," that is, of "great similarity"; "there might be variation in detail, and yet the broad construction and form might be the same." I believe this evidence. It is, in substance, confirmed by facts admitted in cross-examination by the plaintiffs' own manager, Mr. Woodruff (Questions 834–858); and also by a considerable body of documentary evidence, some of which proceeds from sources independent of the parties to the present litigation, and some is traceable to the plaintiffs themselves.

Among the defendant's exhibits were circulars of two German houses (unconnected, so far as appears, with the Berlin Company), carrying on business respectively at Frankfort and Hamburgh, in which sewing machines made or sold by them are classified under the several appellations of "system Wheeler & Wilson," "system Singer," "system Grover and Baker," "system Howe," and "system Wilcox & Gibbs," shewing that these are known denominations of particular kinds of machines upon the continent of Europe. It may be (as was said by the plaintiffs' counsel) that all these were issued after 1870, the time to which the plaintiffs refer the commencement in this country of that use of the name "Singer" by other manufacturers, which they allege to be unlawful.

No such explanation, however, can be given of the circulars of M. Callebaut, a French manufacturer, who in 1865 obtained a gold medal at the Paris Exhibition for a machine or machines of the plaintiffs' own manufacture, for which medal the plaintiffs, in

their own circulars, claimed credit, and to whom the plaintiffs, by agreement, relinquished the exclusive right of manufacturing that class of machines in France. In this circular of M. Callebaut, published certainly before 1870, the words "système Singer," are used to describe the machines of his own French manufacture. Nay, more, the plaintiffs themselves, in the same circulars in which they reckoned M. Callebaut's gold medal among the premiums obtained by them at various industrial and international exhibitions, said, "The principle of the Singer Manufacturing Company's sewing machines has not been changed since their first introduction to the public; yet many beautiful labour-saving additions have been attached," &c.; and they described their family machine as "constructed on sound mechanical principles, which have been thoroughly tested with a view to attain the greatest possible degree of simplicity and durability without liability to derangement," and as sewing "with a straight needle, thus obtaining the greatest possible amount of strength and power to pass seams and irregularities in the work, *which manifestly can never be equalled by any system using a curved needle.*" (The *italics* are in the circular.) This language the plaintiffs' manager, Mr. Woodruff, tried in his cross-examination to explain away, by saying that it "had no meaning," and was "very stupid," and "deceived people," and that the plaintiffs were "capable of doing stupid things as well as other people." It is superfluous to say that the fact appears to me to be of much more value than the explanation.

There were also expressions of an import which, in my opinion, amounts to much the same thing, in the specifications of several patents taken out in this country, by the plaintiffs or their agents, for improvements in their machines. In Newton's specification of 1863 (the invention patented being a communication from Mr. Singer), mention is made of "an ordinary Singer machine fitted with a novel arrangement," and of "Singer's well-known construction of sewing machine." In Woodruffe's specification of 1865, "the means shewn for operating the needle and shuttle," are said to "require no special explanation" because it is "the well-known arrangement of Singer machines."

I think it unnecessary to pursue this point further. It may be

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true, as the plaintiffs say, that the machines to which they now attach that appellation vary, in points which may possibly be useful and important, from their older machines by which it was originally acquired; but the conclusion to which I am brought unhesitatingly by the whole evidence is, that there has been, for many years past, sufficient continuity and identity of method in the construction of the plaintiffs' lock-stitch machines (particularly of machines of those classes which they describe as "Family" or "Medium" and which are also manufactured by the Berlin Company), to make the term "Singer system," as used with respect to those machines, a *bonâ fide* and intelligible description, which has obtained extensive currency both in England and on the continent of Europe, of some really distinctive character or characters in that method of construction.

It follows that, in my opinion, the use of that phraseology by the defendant is not evidence of any fraudulent purpose or intent. It was urged, however, that it ought not to be regarded separately from the use of the brass plate or label which has been adjudged to be an infringment of the plaintiffs' trade-mark; that it is one of a series of acts, designed with a view to, and practically terminating in, the use of that plate or label; and that all such acts, being so connected together, ought to be alike prohibited. In this view I cannot agree. I think that the representations made by the defendant to his wholesale customers, whether orally or by broad sheet, price list, or invoice, have no natural or necessary connection, in intention or in fact, with any deception of retail customers, which might possibly arise from the use of the brass plate or label. No one would contend that there was any such connection, if, in those representations to the defendant's wholesale customers, the word "Singer" had not occurred; and the case is really the same, if (as I think) the word "Singer" was so used as to obviate any reasonable possibility of misunderstanding or deception.

The counsel for the appellants lastly argued, that the plaintiffs trading under Mr. Singer's name, and using his trade-mark, had acquired such a right of property in that name as to entitle them to restrain any rival in trade from introducing it into any of his price lists, circulars, or advertisements, even in such a way as

might exclude the possibility of its being understood to represent, directly or indirectly, that the goods sold by him were manufactured by the plaintiffs, or that his trade or business was identical or connected with the trade or business of the plaintiffs. For that argument no authority was cited; and it cannot, in my opinion, be maintained on any principle. The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right, under colour of the former, to invade the latter, neither have the plaintiffs any right, under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct, and unequivocal way. The Court of Appeal has thought that (apart from the infringement of the trade-mark), this is all that he has done. I think the same, and I therefore move your Lordships to dismiss this appeal.

But with regard to costs I have something special to say. Though your Lordships, if you should concur in the views which I have submitted to you, will think it your duty to dismiss this appeal, yet I am bound to say, looking both to that part of the case as to which the plaintiffs have obtained and retained an injunction, and to some other circumstances which I think one of my noble and learned friends will take notice of, that I cannot regard the conduct or the position of the defendant as meritorious in any point of view. Looking to the bulk and magnitude of the appendix, and to the introduction into it, in a manner which I think decidedly unnecessary and improper, of a vast mass of shorthand writer's notes, it seems to me that it would be right for your Lordships, subject to the modification which I am about to suggest, to give the respondent costs in the usual manner, but that you should limit those costs so far as the appendix is concerned; and what I would propose to your Lordships is that the costs given to the respondent should not include

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either the shorthand writer's notes of the arguments which are in the appendix or any allowance whatever for the drawing of the appendix.

LORD BLACKBURN:—

My Lords, in this case I agree with the noble and learned Lord on the Woolsack that the judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

I should not decide this without hearing the whole argument, if I thought that any of those points were involved in this decision which, in the case of the *Singer Manufacturing Company* v. *Wilson* (1), gave rise to a difference of opinion. In that case the present Master of the Rolls, and on appeal to them the then Lords Justices James, Mellish, and Baggallay, came to the conclusion that on the plaintiffs' case and evidence they had failed to shew that the defendant had done anything wrong, and therefore that it was unnecessary to hear the defendant's evidence. I see that Bacon V.C. says, in his judgment (2), that the Master of the Rolls "non-suited the plaintiff. The House of Lords, on appeal, thought the non-suit was wrong." That is an inaccurate expression, and the inaccuracy is one that may mislead. A non-suit is where a judge who has not the power of deciding the facts rules, as a matter of law, that there is no evidence on which the jury, or whatever tribunal had to decide the facts, could properly find facts sufficient to support the plaintiff's case. The Master of the Rolls was judge alike of law and fact, and what he decided was that there was no evidence on which he found facts sufficient to support the plaintiffs' case; and the Lords Justices were of opinion that there was no evidence on which they found facts sufficient to support the plaintiffs' case. When the case came before this House, the Lord Chancellor (Cairns) not only thought that there was evidence on which they might have found such facts, but he thought, and expressly said, that there was evidence on which he himself found facts sufficient to support the plaintiffs' case.

I do not now inquire whether the difference between these

(1) 2 Ch. D. 434; 3 App. Cas. 376. (2) 18 Ch. D. 405.

very high authorities was as to propositions of law or, as I incline to think, only as to the principles which ought to guide the tribunal when applying the law to the evidence, and as to the inferences which ought to be drawn or the weight which ought to be given to different matters.

That there were differences sufficient to lead to opposite results is clear, and if I thought that the evidence in the present case rendered it necessary to decide on any points on which those differences existed, I should certainly wish to hear all that was to be said by the counsel for the respondent; for I think it no light thing to dissent from an opinion of Lord Cairns, even though in doing so I should agree with such eminent judges as the Master of the Rolls and Lords Justices James, Mellish, and Baggallay. But I must also say that I think it no light thing to differ from such eminent authorities, even though in doing so I should agree with Lord Cairns. Neither should, I think, be done, unless it is necessary for the decision, and then only after full and careful deliberation. These considerations induced me to agree to the Lord Chancellor's proposal, thus expressed in 3 App. Cas. p. 392, "to reverse the decree of the Master of the Rolls, but to declare that this is to be without prejudice to any question in the case, and to remit," &c. And that only, I think, was the decision of this House.

I agree, I think, with every one who has as yet had to express an opinion on the case at bar, that, notwithstanding the enormous length of the evidence produced in this case, the matters of fact really in controversy are short and simple. And I also agree that all the law which is material for the decision of this case is well settled. Some points are perhaps still moot points; in what I now say I shall, when I touch on any one of those, point out why I think it is not necessary now to decide it.

The original foundation of the whole law is this, that when one knowing that goods are not made by a particular trader sells them as and for the goods of that trader, he does that which injures that trader. At first it was put upon the ground that he did so when he sold inferior goods as and for the trader's; but it is established (alike at law: *Blofeld* v. *Payne* (1), and in equity:

(1) 4 B. & Ad. 410.

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Edelsten v. *Edelsten* (1)), that it is an actionable injury to pass off goods known not to be the plaintiff's as and for the plaintiff's, even though not inferior.

The modes in which goods may be passed off as and for the plaintiff's vary. The most usual is where a particular mark on the goods or on the packages in which they are sold has been used to denote that they are made by a particular firm to such an extent that it is understood in the market to bear that meaning. The law as to those trade-marks is now regulated by statutes, but before there was any legislation on the subject it was well settled that when any one adopted a mark so closely resembling the trade-mark of the plaintiff that it would be likely to be mistaken for it, and put it on his goods and sold them, knowing that though the persons to whom he sold them were well aware that they were not the plaintiff's make, yet that they were meant to be sold to others who would see only the trade-mark, and were likely to be deceived by its resemblance to that of the plaintiff, he might be properly found to have knowingly and fraudulently sold the goods as and for the plaintiff's goods: *Sykes* v. *Sykes* (2). And, so far, there was no difference between law and equity. But at law it was necessary to prove that an injury had been actually done. In equity it was enough to shew that the defendant threatened to do, and would, if not prevented, do, that injury. But there is a further question on which there may be a difference between law and equity.

In 1838 the case of *Millington* v. *Fox* (3) was decided by Lord Cottenham, then Lord Chancellor. There the plaintiffs were the successors in business of a firm of manufacturers of steel, originally founded by a person of the name of Crowley, and afterwards carried on by Crowley, Millington, & Co.; and those firms, and the plaintiffs as their successors, used as their trade-mark or brand on their steel the words "Crowley" and "Crowley Millington." The Lord Chancellor in that case said: "I see no reason to believe that there has in this case been a fraudulent use of the plaintiff's marks. It is positively denied by the answer, and there is no evidence to shew that the defendants were even

(1) 1 D. J. & S. 185. (2) 3 B. & C. 541.
(3) 3 My. & Cr. 338.

aware of the existence of the plaintiffs as a company manufacturing steel, for although there is no evidence to shew that the terms 'Crowley' and 'Crowley Millington' were merely technical terms, yet there is sufficient to shew that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of these names, and, therefore, I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual" (1).

It is, to my mind, obvious that though the defendants might have committed no actionable wrong whilst using the plaintiffs' trade-mark innocently, yet, if they persevered in the use of it after they had knowledge of the facts, they would do wrong, and there would be evidence to support a claim at law for damages for knowingly selling the defendants' goods as and for the plaintiffs'.

Crawshay v. *Thompson* (2) was an action at law in 1842. The declaration did not assert that the defendants had used the plaintiff's trade-mark, consisting of an oval figure with the letters "W. C." on it, but that "the defendants marked iron of their make with an oval figure containing the letters 'W. O.,' well knowing that this mark was intended to be in imitation of and similar in appearance to the mark so used by the plaintiff," and so sold their iron as and for the plaintiff's. Not guilty was pleaded, and, on the trial, evidence was given that the iron with the plaintiff's brand bore a high reputation in the Turkish market, and that the defendants had marked their iron with the brand "W. O." at the request of a merchant at Constantinople. The plaintiff gave notice to the defendants that the use of this brand deceived the Orientals, and required them to desist. The defendants, nevertheless, persevered. Chief Justice Tindal, before whom the cause was tried, left it to the jury (3) "to say, first, whether they were satisfied that the defendants' mark bore such a close resemblance to the plaintiff's as in its own nature was calculated to deceive the unwary or persons who were moderately

(1) 3 My. & Cr. 352. (2) 4 Man. & G. 357.
(3) 4 Man. & G. 363.

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skilled in the article, and to injure the sale of the plaintiff's goods; and, secondly, what was the intention of the defendants in using the mark complained of, whether it was for the purpose of supplanting the plaintiff, or done in the usual course of trade, and in execution of foreign orders sent to their house; because his Lordship said it seemed to him that unless there were such a fraudulent intention existing (at least before notice), and it were proved to the satisfaction of the jury, the defendants would not be liable." The effect of the defendants continuing to use the marks after notice, supposing the previous use to have been innocent, was reserved as a point of law for the consideration of the Court.

The jury found for the defendants, and a rule for a new trial was discharged. Language was used by the judges which may be understood as laying down that proof of fraud, perhaps even of fraudulent intention, is essential at law to the maintenance of the action, and that even though the defendants had been proved to have done wrong after notice, yet, if they bonâ fide thought the notice was unfounded the action would not lie, I suppose on the ground that the receipt of notice is not more than evidence of knowledge. I express no opinion as to whether this is the meaning of what was said in that case, or as to whether such is the rule at law. Lord Cairns, in 3 App. Cas. 391, expresses a decided opinion that it is not the rule in equity. All that I think it proper now to decide is that there is nothing in the evidence in the case at bar to raise such a point.

There is another way in which goods not the plaintiffs' may be sold as and for the plaintiffs. A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade-mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs' just as much as the use of a trade-mark; and I think the law (so far as not altered by legislation) is the same. And I think it settled

by a series of cases, of which *Hall* v. *Barrows* (1) is, I think, the leading one, that both trade-marks and trade names are in a certain sense property, and that the right to use them passes with the goodwill of the business to the successors of the firm that originally established them, even though the name of that firm be changed so that they are no longer strictly correct. This was evidently Lord Cottenham's opinion in *Millington* v. *Fox* (2), and I know of no authority against it.

The plaintiffs here are the successors of I. M. Singer, and are as such entitled to the use of the trade names, acquired by him and their other predecessors. There is no question as to trade-marks. And, though I do not think it can be said as a matter of law that the name of a trader is necessarily, when applied to goods of the kind he deals in, to be understood as designating his goods, so as necessarily to be a trade name, yet that is very likely to be the case, and I have no doubt that in this case it is proved that the words "Singer," or "Singer's machines," when applied to sewing machines, are understood by most persons to be the trade name of the plaintiffs. The evidence intended to contradict this goes as far, and in my mind, no further than to establish that these terms were very generally used by particular persons, but not by every one, as designating machines of a particular type by whomsoever made or sold. And so far there is no solid distinction between the facts in this case, and those found in *Millington* v. *Fox* (2).

In the case in Scotland against *Kimball* (3), and in that against *Wilson* (4), the defendants had used the name of Singer in advertisements as designating their machines, and they did not deny that they knew that the plaintiffs had used that name; but they alleged that they had always taken such precautions in the wording and heading of their advertisements, stating that the Singers they sold were made by them, that the use of the name could not mislead anyone.

The Court of Session in *Kimball's Case* (3), by their interlocutor, "find that for a period of at least seven years prior to the petition for interdict being presented in the inferior Court, the name

(1) 4 D. J. & S. 150. (3) 11 Court Sess. Cas. 3rd Ser. 267.
(2) 3 My. & Cr. 338. (4) 2 Ch. D. 434; 3 App. Cas. 376.

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Singer had in the sewing machine trade been used and appropriated exclusively to designate and identify the sewing machines made by the pursuers: Find that the defenders have recently sold and offered for sale machines made by themselves under the name of 'Singers,' 'Singer machines,' and 'Singer sewing machines': therefore grant interdict," &c.

I do not think it necessary to say what, in my opinion, was the effect of this decision of the Scotch Court. It may be that, having found on the evidence that the pretences of warning all who bought the so-called Singers that they were not made by the pursuers were, in plain English, shams, and that the defenders really sold their machines as and for the pursuers', they had sufficiently expressed this in the finding. It may be that they went further, and that this finding shews that, in the opinion of the Court of Session, the defence that the defenders had always qualified the use of the plaintiff's trade name in such a manner as to prevent its misleading was irrelevant and that they need find nothing on it. Mellish L.J. seems to have understood them to go so far.

In *Wilson's Case* (1) the Master of the Rolls and James, Mellish, and Baggallay L.JJ. all thought that it was proved that the defendant had always taken such precautions as effectually to prevent the possibility of deceit, and so doing proved a defence; and Mellish L.J. (2) gives his reasons for thinking that the Scotch Court, as he understood their decision, had gone further than any English case had gone, and further than an English Court should follow. When the case was brought up to this House Lord Cairns thought and said that the evidence did not, in his opinion, prove that effectual precautions had been taken. It may be that he thought that the Court of Session, if going as far as Mellish L.J. thought, had not gone too far, and that an English Court should follow them; I do not know how that may be; he did not express an opinion on that point either way.

As I have already said, if in the case now at bar the defendant had used the trade-name of the plaintiffs, as it is stated in the second finding of the Court of Session, I should not on this state of the authorities decide without at least hearing the whole argu-

(1) 2 Ch. D. 434; 3 App. Cas. 376. (2) 2 Ch. D. 455, 456.

ment. But the defendant in this case alleges, and I think proves, that he never has sold or offered for sale machines made by himself under the name of Singer, or Singer machines, or Singer sewing machines, or any name so resembling those names as to be calculated to mislead. He makes one admission which I will read. "It is the fact that the defendant sometimes, but not always, attaches to Singer machines sold by him, and manufactured by the said foreign company hereinbefore referred to, and sold by the defendant as their agent as aforesaid, brass labels, or plates. In many cases there is no label or plate at all upon the machine; in the great majority of cases in which there has been any such label or plate such labels have been German inscriptions, and in the case of from about two hundred and fifty to three hundred machines, and no more, before the commencement of this action, the defendant sold machines to dealers with brass plates or labels upon them, which contained the words in the centre 'F. & R. 128 London Wall, London,' which were the prominent and conspicuous words, and round them in smaller letters were the words 'Frister and Rossmann's Singer machine' in letters of an uniform size, connected together by the words 'German' and 'manufacturer' in smaller letters. All the other labels or plates upon any sewing machines sold by the defendant have either had German words upon them, with no reference to the words 'Singer machine' at all, or have been labels similar in form, size, and appearance to the first mentioned labels, but with the words 'Frister and Rossmann's shuttle machine' in lieu of the words 'Singer machine.' Although the defendant is satisfied and believes that no person has been or could really be misled or deceived by the words 'Singer Machine' as used on the said labels or plates in the only manner in which he has ever used them before the commencement of this action, yet the question is of no importance to the defendant, and to avoid all excuse for further litigation the defendant has, since the commencement of this action, absolutely ceased to use, and the defendant has not since the commencement of this action sold or disposed of any sewing machine with any such label, plate or mark thereon, or having the word 'Singer' upon it, and in order to avoid useless expense he hereby submits and undertakes not to use, and he

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offers to submit at once to a judgment and injunction, with such costs as this Court shall direct, against his using any label or brass plate upon or attached to any sewing machine in which the words 'Singer Machine' or 'Singer system' or the word 'Singer' either alone or in conjunction with any other word or words, is in any way used, or selling or using any such machine with the word 'Singer' on the above or otherwise affixed thereon, or attached thereto."

An injunction was drawn up in terms of this submission, and against that the defendants have not, and after that submission could not, appeal.

The defendants do admit that they have in their advertisements and circulars said that they make and sell machines made on the Singer system; and they maintain, and as I think correctly, that they have a right so to do, if they do no more. An attempt was made to prove that there was nothing that could properly be called a Singer system, and that therefore the use of these words, said not to be strictly accurate, must be equivalent to the words "Singer machines." I think that this attempt totally failed. The plaintiffs themselves had in a patent as early as 1863 used the words "an ordinary Singer machine," and "Singer's well known construction of sewing machines," and in many of their circulars both before 1870, when the Scotch suit against Kimball was begun, and since, have used the phrase. I do not inquire whether it has a definite scientific meaning. I agree with what the noble and learned Lord on the Woolsack has just said, that scientific or not, loose or not, it has been used by the plaintiffs themselves, and by others in the trade, to signify not a fiction, but a fact.

I am relieved from examining the various documents relied upon, because I should in doing so only repeat what has been already said by the Lord Chancellor, in which I entirely concur. In only one, namely the invoices, are the words "Singer machine" used. I entirely agree that when a person (in this case a person acting as a detective for the plaintiffs) sent an order to a wholesale house for one of their Singer's, it was very natural that the wholesale house should, in sending in their invoice, adopt the term used in the order, and that doing so could not deceive a

person who had already ordered the goods. And I think that there was no ground for saying that the defendants ought to have been careful in using the description on the invoice lest it should be used as a means for deceiving subsequent purchasers of the article. The wholesale house throughout issued their prices to dealers who came to them confidentially, and that for an obvious reason; it was not wished by those dealers that the purchasers from them should know how much they had added to the price for which they bought them from the wholesale house, and the invoice would shew that price, and therefore would not be shown to a purchaser from the dealer.

There is only one other matter on which I think it necessary to say anything. The Master of the Rolls in *Singer* v. *Wilson* (1) says that the Attorney-General (Holker) "wanted the general question decided, whether he was entitled to the injunction as asked by that prayer, namely to restrain the defendant from offering for sale any sewing machine as 'Singer's,' or the 'Singer' machine, whether he said it was made by himself or not." I do not find that the counsel in the House of Lords, of whom Sir John Holker was not one, renewed this request. Nothing certainly was said about it by any of the Lords, unless it was in my mind, when I said that the plaintiffs, if the allegations in their bill were proved, were entitled to some relief, and added "whether they would be entitled to an injunction to the extent which is asked for in the prayer of the bill is a different question" (2). I have no independent recollection of what I meant, but I think it probable enough that I was referring to this. At all events nothing was decided in this House on this point. And nothing falls to be decided in this case as to whether there was such a right as to the use of the trade name, for it is not used.

But it was argued that the plaintiffs were entitled to an injunction to prevent the use of the plaintiffs' name in any way in reference to articles such as they sell. It was not denied that every one was at liberty to make and sell machines in every respect identical with those made by the plaintiffs, and to say that the goods he made and sold were identical with those made by the plaintiffs in shape and construction, and to allege that the materials

(1) 2 Ch. D. 440. (2) 3 App. Cas. 397.

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were better than those used by the plaintiffs, and more skilfully put together, and sold cheaper, and all this for the purpose of rivalling the plaintiffs. But it was said that the plaintiffs' family name must not be used at all for such an object. No authority was cited in support of such an extensive proposition, and I do not think it is founded on sound principles.

I also agree that the special order as to the costs proposed is just in this case.

LORD WATSON:—

My Lords, notwithstanding the mass of evidence with which this case is encumbered, it does not, in my opinion, raise any doubtful or difficult question either of fact or law.

I think it is established by the evidence that the name "Singer," as used by the appellant company, and their predecessor in business, Isaac Merritt Singer, has long been, and still is, generally understood to denote sewing machines of their manufacture. The machines made by Mr. Singer, and afterwards by the company, were of several different classes, suitable to the various kinds of work for which they were required by customers; and, as recent improvements were from time to time adopted by the manufacturers, the machines of each class varied at different periods, both in the arrangement of their parts, and in their outward form. It is, in my opinion, clearly proved that, notwithstanding these progressive improvements and variations, the sewing machines manufactured by Mr. Singer and the appellant company have been distinguishable by their external form and adjustment of parts from the machines of other manufacturers; and that a customer desiring to purchase a "Singer" sewing machine invariably understood that he was buying, and expected to get not merely a machine made by Mr. Singer or the company, but a machine of the same shape and character with one or other of the classes which he or they were known to be making at the time.

The legal consequence of these facts is that the appellant company have a right—an exclusive right, to use the name "Singer" as denoting sewing machines of their manufacture; and that no one has a right to use the word for the purpose of passing off his goods as theirs, or, even when he is innocent of that purpose, to

use it in any way calculated to deceive or aid in deceiving the public. None of the numerous authorities cited at the bar by the appellants' counsel carry the exclusive right of a trader to a particular name, beyond that limit. There is no authority, and, in my opinion, no principle for giving the trader any higher right. If he cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the name by others.

No doubt, as has been noticed by the noble and learned Lord (Lord Blackburn), Mellish L.J. in the case of *The Singer Manufacturing Company* v. *Wilson* (1) states that the Scotch Courts had gone the length of holding "that there is a property acquired in a trade-mark or trade-name to this extent, that no one else is entitled to use that mark or name at all as applied to the particular article in connection with which it has been used, even though he does it perfectly honestly and in a way not calculated to deceive." I venture to think that the learned Lord Justice misapprehended the judgment of the first division in *Kimball and Morton's Case* (2). What the majority of the Court, at least, intended to decide, and the import, as I read it, of their interlocutor, which was quoted in full by my noble and learned friend, is this—that the defendants had so used the name "Singer" in connection with the sale of their own machines, that purchasers of their machines believed they had been made by the Singer Manufacturing Company. Lord Deas, in that case, stated that the result of the proof went to shew that, "what so enabled the defenders to increase their trade was the belief of purchasers that their machines were made by the Singer Company." Lord Ardmillan was "satisfied both of the intention and the tendency of the defender's proceedings to deceive the public into the acceptance of the machines as made by Singer & Co., though not so made." The Lord President (Inglis) who does not go so far as to hold with his brethren, that actual deception had been proved, does use some expressions which taken per se, might, in the opinion of some, lead to the conclusion which Mellish L.J. thinks was accepted by the Court. But the Lord President proceeds to make the grounds of his judgment very clear by summing up the law and facts of the

(1) 2 Ch. D. 455. (2) 11 Court Sess. Cas. (3rd Ser.) 267.

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case in these words:—"I do not think it necessary that they (i.e., the pursuers) should go the full length of their averment when they say that this has been done with the object and effect of leading and inducing the public to believe that the machines are manufactured by the said company. It is sufficient to my mind if it is calculated to have that effect; and that it is calculated to have that effect is a most reasonable conclusion from the evidence before us."

But for the respect which I entertain for the judicial utterances of the late Lord Justice Mellish, I should not have thought it necessary to make these observations upon *Kimball and Morton's Case* (1), which appears to be a decision in perfect accordance with the principles recognised by the English authorities. Tested by these principles the acts of the respondent, with which we are concerned in this appeal, constitute no invasion of the appellants' exclusive right. What these acts were I shall not attempt to state, because I entirely agree with the view expressed by the noble and learned Lord on the woolsack as to their character and probable effect.

I therefore agree with your Lordships that the judgment of the Court of Appeal ought to be affirmed; and I concur in thinking that in the circumstances of this case the costs of the respondent ought to be dealt with as your Lordships have suggested.

LORD BRAMWELL:—

My Lords, the case of the plaintiffs (not from any fault of their counsel) was so loose and vague that, instead of trying to state and deal with it, it is easier to consider what the defendant is charged with having done, and see if there is anything in it of which the plaintiffs have a right to complain. Now, as has been said by the noble and learned Lord on the woolsack, there are four documents or papers published or uttered by the defendant to which the plaintiffs object. Three of them state the defendant to be a seller of sewing machines which he calls "Singer sewing machines," but which he says are made by manufacturers at Berlin. The plaintiffs say that this is a representation that the

(1) 11 Court Sess. Cas. (3rd Ser.) 267.

machines are of the plaintiffs' make, because, say the plaintiffs, you the defendant mean something by the expression "Singer sewing machine"; but as there is no principle, or system, or plan, which is peculiar to the machines we make, a Singer sewing machine must mean one of our make, though you say it is not. And in order to make out this case, practical men have been called to shew that by "Singer sewing machine" one made by the plaintiffs is understood in the trade, and what is called scientific evidence has been given to shew that there is no principle in the machines made by the plaintiffs. I cannot but think that my lamented friend, Sir H. Jackson, engaged in a very unprofitable verbal discussion on this head. For I am very clearly of opinion that whether "principle" is or is not the right "word," there is undoubtedly the "thing" there, the existence of which he wished to establish, viz. a plan on which the plaintiffs make the bulk of their machines, a plan which may have been altered and improved from time to time, but which as it now exists is the usual plan. And I come to this conclusion from the acts and conduct of the plaintiffs themselves, who have continually spoken of the "Singer system" and to the like effect. I say therefore that it is not true that the "Singer sewing machine" has no meaning but that of a machine made by the plaintiffs. But further suppose it to be unmeaning, inaccurate, wrong, as applied to any machine not made by the plaintiffs, it is manifest that as the defendant's circulars say that the machines he sells are not made by the plaintiffs, the result is, not that he by implication says the contrary of what he expressly says, but that he has used a wrong, unmeaning, inaccurate expression. And so every one who reads his circulars would understand—at least no one would understand that the plaintiffs made the machines which the defendant says the Berlin Company make. Those who know there is no Singer principle, or system, or plan, know that the defendant uses a wrong expression; those who do not know there is no Singer principle, system, or plan, will on reading the circular suppose there is, but that it is used by the Berlin makers.

As to the invoice and receipt, they were given to an agent of the plaintiffs who knew the truth. I think the defendant was correct in calling the machines "Singer machines," but even if not he

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only used a wrong word, and misled no one. But then it was said the word "Singer" is a catch word and is misleading. People who know no better may read "Singer sewing machine" and nothing more, and so be misled. I suppose such a thing is not impossible. But, in the first place, there was no evidence of it. In the next place, it is eminently improbable, as the defendant deals with wholesale houses who know what they are about. And thirdly, the possibility of such a mistake is not a cause of action. The same thing might happen if the defendant issued circulars that his were "not" Singer sewing machines. For however large he printed the "not" some one might not see it.

The result is that in my judgment the defendant has uttered no untruth nor anything calculated or likely to mislead or deceive in these four documents. But I cannot help saying that the defendant ought to be very much obliged to those who advised him to discontinue the brass ticket on the machines sold by him; and I think that advice might be carried further, and that he would do well to give up shape, and stand, and ornamentation, which to me look very much as though it was intended his machines should be taken for the plaintiffs'. I concur in advising your Lordships to dismiss the appeal.

Order appealed from affirmed, and appeal dismissed with costs, subject to the following directions:— That in taxing the respondent's costs of the appeal nothing be allowed for drawing the appendix, and that all costs of so much of the appendix as consists of shorthand notes of arguments be disallowed.

Lords' Journals 13th December 1882.

Solicitor for appellants: *J. N. Mason.*
Solicitors for respondent: *Michael Abrahams & Co.*

[HOUSE OF LORDS.]

HARVEY, otherwise FARNIE . . . . Appellant;
FARNIE . . . . . Respondent.

H. L. (Sc.)
1882
Nov. 30.

Marriage in England between Scotchman domiciled in Scotland and Englishwoman—Decree of Divorce by Scotch Court, by reason of Husband's Adultery only—Validity of Divorce in England.

The English Courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion, or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

When an English woman marries a domiciled foreigner, the marriage is constituted according to the lex loci contractus; but she takes his domicil and is subject to his law.

A domiciled Scotchman married, in England, an English woman. Immediately after the ceremony the married couple went to Scotland and resided there as their matrimonial home. Two years after, the wife obtained in Scotland a divorce à vinculo matrimonii, on the ground of her husband's adultery only. The husband came to England, and married there another English woman, the first wife being still alive. In a suit for a declaration of the nullity of the first marriage at the instance of the second wife:—

Held, affirming the decision of the Court below, that the divorce in Scotland was a sentence of a Court of competent jurisdiction, not only effectual within that jurisdiction but entitled to recognition in the Courts of this country also.

Lolley's Case (Russ. & Ry. 237) explained; *Warrender* v. *Warrender* (2 Cl. & F. 488); *Geils* v. *Geils* (1 Macq. 255) undistinguishable; *Maghee* v. *M'Allister* (3 Ir. (Ch.) 604) also undistinguishable and affirmed; *M'Carthy* v. *Decaix* (2 Russ. & My. 614) dissented from.

Query, Whether a bonâ fide change of domicil which was English at the date of the contract would affect the question of dissolution; and whether *Pitt* v. *Pitt* (4 Macq. 627) would govern cases like *Niboyet* v. *Niboyet* (4 P. D. 1) if they arose in Scotland.

APPEAL from the Court of Appeal.

Henry Brougham Farnie, the respondent, a Scotchman by birth, and domiciled in Scotland at the time of his marriage, married on the 13th of August, 1861, at Cardigan, Elizabeth Bebb Davies, an Englishwoman; and immediately after his marriage returned with her to Scotland, as their permanent

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matrimonial home. He lived with her there until 1863, when his wife obtained in the Scotch Courts a decree for divorce à vinculo matrimonii, upon the sole ground of his adultery committed in Scotland.

After the dissolution of the marriage, the respondent came to England; and on the 31st of May, 1865, married the appellant, his first wife being still alive. In 1879, when the appellant was about to prosecute a suit for divorce on the grounds of cruelty, adultery, and desertion, she heard for the first time of the prior marriage and of the decree of divorce; and having ascertained that the said Elizabeth Bebb Davies was living at the time of the marriage in 1865, she presented a petition praying for a declaration that her marriage with the respondent was null and void.

The respondent, in his answer, referring inter alia to his Scotch domicil, set out the decree of the Court of Divorce in Scotland, and prayed the rejection of the appellant's petition.

The appellant in her reply stated, that whatever may have been the effect in Scotland of the decree, the respondent did not thereby become free during the life of Elizabeth Bebb Davies to contract a valid and lawful marriage in England.

James, Cotton, and Lush, L.JJ., affirming the decision of the President of the Probate and Divorce Division (1), dismissed the petition (2).

Nov. 28, 30. *Benjamin*, Q.C., and *Fooks*, contended for the appellant, that it is a general rule of English law that a marriage solemnized in England between an English woman domiciled in England and a foreigner (a Scotchman being for this purpose in the same position with a foreigner), is an "English marriage" in contemplation of English law; Secondly, that no foreign Court had any jurisdiction to dissolve such a marriage: *Lolley's Case* (3); Lord Eldon in *Tovey* v. *Lindsay* (4); *M'Carthy* v. *Decaix* (5); Lord Lyndhurst in *Warrender* v. *Warrender* (6); Lord Westbury in *Shaw* v. *Gould* (7); or, at all events, a dissolution by an otherwise competent foreign jurisdiction was only recognised by

(1) 5 P. D. 153.
(2) 6 P. D. 35.
(3) Russ. & Ry. 237.
(4) 1 Dow App. 117, pp. 136, 141.
(5) 2 Russ. & My. 614.
(6) 2 Cl. & F. 488, at pp. 558, 567.
(7) Law Rep. 3 H. L. at pp. 86, 87.

the English Courts when granted for causes for which it might have been obtained in England. Thirdly, even considering the validity of the Scotch decree it could not have any extra-territorial effect and must be held invalid in England.

Lolley's Case, 1812 (1), decided that no sentence or act of any foreign Court or state could dissolve an "English marriage à vinculo matrimonii for grounds for which it was not liable to be dissolved à vinculo matrimonii in England." That unanimous decision of twelve judges was not based upon the particular facts of that case, but upon general principles peculiarly applicable to the general law of England. It was upheld by all the subsequent cases. In *Tovey* v. *Lindsay*, 1813 (2) the question whether the Scotch Courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in England according to English law, was submitted, but was not decided. The interlocutors under appeal were pronounced before *Lolley's Case* (1) was decided, and the judges being of opinion that that decision and other questions had given the case a more serious aspect, it was remitted for further consideration, but Mr. Lindsay dying it never came to a final decision (3). But there Lord Eldon said, by English law, "an English marriage could not be anywhere dissolved except by Act of the Legislature" (4).

That case was followed by *M'Carthy* v. *Decaix*, 1831 (5), and from the printed papers and the judgment, it plainly appears, that the question was clearly raised and absolutely decided in the appellant's favour. The husband, a domiciled Dane, married in England an English woman; they returned to Denmark as their matrimonial home, and after a time the husband obtained a valid Danish divorce there. The wife returned to England. After the death of both, a question between the personal representative of each, arose, whether the husband after the divorce and death of the wife had renounced all claims which accrued to him under a settlement, or in his marital character. The point was made that the husband had been deceived, both as to the effect of the divorce and also as to the deceased wife's property, and then arose the point as to the recognition of the Danish divorce

(1) Russ. & Ry. 237.
(2) 1 Dow. 117.
(3) See 2 Cl. & F. at p. 565.
(4) 1 Dow. at p. 136.
(5) 2 Russ. & My. 614.

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by English law. And Lord Brougham decided that the wife was still the wife (1). He said, "Now, if it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an *English* marriage, then nothing whatever has been established. For what was *Lolley's Case?*" (2).

Then what was an "English marriage?" In *Warrender* v. *Warrender*, 1835 (3), a case similar in facts to this, but no decision as to the English law, inasmuch as—and all the Lords specially mention it—this House was then sitting on a Court of Appeal as to the law of Scotland, Lord Lyndhurst called a marriage between a domiciled Scotchman solemnized in England according to English law and ritual, an "English marriage" (4); see also Lord Brougham (5).

[LORD SELBORNE, L.C.:—The words "English marriage," are liable to two constructions—the contract of marriage performed in England is an "English marriage;" and a marriage performed with a domiciled Englishman is an "English marriage," and these words are used with this double sense by the Judges in the case of Lolley and others.]

When the words "English marriage," or "Scotch marriage" are used in these mixed marriages, the marriages are called with respect to the dissolution, an "English marriage," and with regard to civil rights a "Scotch marriage." In *Munro* v. *Munro*, 1840 (6), a Scotchman cohabited with a woman in England, and had children, and then married her in England; with regard to a question as to the descent of real estate in Scotland, Lord Cottenham called it a "Scotch marriage;" see also *Birtwhistle* v. *Vardill*, 1835 (7). In *Geils* v. *Geils* (8) Lord St. Leonards said, "She (the wife) is equally an English wife; the marriage is both an English and a Scotch marriage." Then he continued: "I am not here to advise your Lordships to dispute the law in *Lolley's Case* (2). It shows, that which we know well exists, a conflict between the law of England and that of Scotland." And

(1) 2 Russ. & My. at p. 619.
(2) Russ. & Ry. 237.
(3) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(4) 2 Cl. & F. 488, at p. 564: alluding to *Duchess of Hamilton* v. *Duke of Hamilton*, February 7, 1794, Fer. Cons. App. 260.
(5) 2 Cl. & F. p. 540.
(6) 7 Cl. & F. 842.
(7) 2 Cl. & F. 571.
(8) 1 Macq. at pp. 258, 259, 263, 364.

he concurred with Lord Brougham that *Warrender* v. *Warrender* (1) would not break in on *Lolley's Case* (2). The only point there was whether the wife had lost her right to go to the Court of Scotland for further relief in consequence of the relief which she had already obtained in the Courts of this country, and it was then held that the Scotch Courts had jurisdiction in Scotland for Scotch purposes. In *Dolphin* v. *Robins*, 1859 (3), Lord Cranworth stated that *Lolley's Case* (2) had been frequently acted on. That it was now established that the Scotch Courts had no power to dissolve an "English marriage where the parties are not really domiciled in Scotland;" and he declined to give an opinion whether the Scotch Courts could dissolve such a marriage if there had been bonâ fide domicil in Scotland.

[LORD SELBORNE, L.C.:—If the parties were domiciled in England at the time of the marriage, the question then might arise, if the husband changed his domicil, whether there was not a breach of the contract, and it could not be dissolved according to the law of the new domicil.]

The only question in this House in *Pitt* v. *Pitt*, 1864 (4)—a marriage in England,—was as to whether Colonel Pitt had obtained an absolute domicil in Scotland; the counsel for the respondent, Colonel Pitt, having withdrawn the contention that the Scotch Courts could annul the marriage of a foreigner, not domiciled, though temporarily resident within the Scotch jurisdiction. In *Maghee* v. *M'Allister*, 1853 (5), it was held that a marriage solemnized in England between a domiciled Scotchman and an Irishwoman may be dissolved by decree for divorce pronounced by the Scotch Courts. That case was not cited in *Pitt* v. *Pitt* (4), or *Dolphin* v. *Robins* (3); but, admittedly, it was against the appellant so far as it went. In *Shaw* v. *Gould*, 1868 (6) a question arose as to the right of children by a second marriage to succeed to property situated in England. Two domiciled English persons were married in England, the marriage was never consummated; but the husband committed adultery in England.

(1) 2 Cl. & F. 488.
(2) Russ. & Ry. 237.
(3) 7 H. L. C. 390, at p. 414.
(4) 1 Ct. Sess. Cas., 3rd Series, 106; reversed on app. 4 Macq. 627. As to remarks of the Lord Chancellor, see Lord Westbury at p. 640.
(5) 3 Ir. Ch. 604.
(6) Law Rep. 3 H. L. 55, at p. 81.

(3) 5 C 5 Jur N.S. 1271-3.
(4) 5 C 10 Jur N.S. 735

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For the purpose of getting a divorce they proceeded to Scotland, and there the wife obtained a divorce; and married in Scotland an Englishman, who thenceforth took up his permanent abode in Scotland. In that case Lord Westbury was of opinion (1) that where a Scotchman married an Englishwoman in England, that was an "English marriage," and he blamed Lord Brougham for calling *Warrender* v. *Warrender* (2) a Scotch marriage, which he did, said Lord Westbury, for the purpose of escaping from the resolution in *Lolley's Case* (3). Lord Westbury also said: "The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the Judge who pronounced it . . . . but it may still not be such a sentence as by the comity of nations has an extra-territorial effect and authority." "The first essential for the validity of a foreign decree is that it should be pronounced by a Court of competent jurisdiction between parties who are bonâ fide subject to that jurisdiction" (4).

Applying that proposition to the further point, where one of the parties is English, the wife in this case, and taking the element of the English marriage, it applied here, and it followed that though the decree of divorce might be good and valid in Scotland, it had no extra-territorial effect in England. In *Niboyet* v. *Niboyet*, 1878 (5) domicil was held not necessary to give jurisdiction. The doctrine of the English law is that the wife had a right to remain the wife as a consequence of the marriage—though equally true, that the domicil of the husband is the domicil of the wife. But her consent to go into a foreign jurisdiction does not alter the circumstances under which she entered into the marriage contract, namely, on the footing—as it must be taken—that the English contract would be governed by the law of England. They submitted the House could not decide this case in the same way as the Court below had done without overruling *Lolley's Case* (3). [*Ringer* v. *Churchhill*, 1840 (6), and *Sotomayer* v. *De Barros* (7) were also referred to.]

Winch, and *Alexander Ward*, for the respondent, were not heard.

(1) Law Rep. 3 H. L. at pp. 86, 87.
(2) 2 Cl. & F. 488.
(3) Russ. & Ry. 237.
(4) Law Rep. 3 H. L. at p. 81.
(5) 4 P. D. 1.
(6) 2 Ct. Sess. Cas. 2nd Ser. 307.
(7) 5 P. D. 94.

LORD SELBORNE, L.C.:—

My Lords, this case has been argued by the learned counsel for the appellant at considerable length, and the legal principle involved in it is not new to your Lordships. If it were not that there has been much consideration and discussion, if not in cases exactly resembling the present, yet in cases involving principles bearing upon the present, I have no doubt that your Lordships would have desired to hear a full argument on both sides; but looking to the nature of this particular case and to the state of authority upon the subject, I believe your Lordships are all of opinion that it is not necessary to call upon the counsel for the respondent here.

The ground upon which this Scotch divorce is impeached appears to be this, and this alone, that by the law of England a divorce for such a cause (adultery) as was alleged here, is only granted at the suit of the husband, except under particular circumstances, which in this case do not appear to have existed. The husband's adultery, without anything more, would not in England be a ground of divorce. It is a ground of divorce in Scotland; and this divorce was upon that ground at the suit of the wife.

The circumstances under which this divorce was obtained were these. The marriage had been solemnized in England; but at the time of the marriage the husband was domiciled in Scotland. That matrimonial domicil was never changed. The husband and wife lived in Scotland; the adultery was committed in Scotland; and when both parties were resident there the suit for divorce was instituted in Scotland, and a decree was regularly pronounced by the Scottish Courts. The judge of the Divorce Court and the Court of Appeal have both held that under those circumstances the sentence of divorce, not being impeached for any species of collusion or fraud, was the sentence of a Court of competent jurisdiction, not only effectual within that jurisdiction, but entitled to recognition in the Courts of this country also. On the other side it has been contended that there is a general rule of English law, supposed to have been established in *Lolley's Case* (1) and not to have been since departed from,

(1) Russ. & Ry. 237.

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to the effect that if an Englishwoman is married within the English jurisdiction to a foreigner, (a Scotchman being for this purpose in the same position with a foreigner,) that is a marriage which the English Courts must regard as indissoluble by any other than an English jurisdiction; or at all events only dissoluble in the view of an English Court if dissolved by some other competent jurisdiction for a cause for which it might have been dissolved in England.

Now, I must take the liberty of saying that if this question is to be tested upon principle apart from authority, although it cannot be denied that the varying jurisprudence, and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet I should certainly say that in such circumstances as those which exist in the present case the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the Courts of other countries. Of course I assume that in the way of that recognition there would not be interposed any positive legislation bearing upon the point, or any positive prohibition of its own law binding upon the Court in which the question arises. Upon this point of principle how does the matter stand? Let it be granted (and I think it is well settled), that the general rule, internationally recognised, as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere if it is well constituted secundum legem loci contractûs. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his, which she acquires. The marriage is contracted with a view to

that matrimonial domicil which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicil. That would appear to be so upon principle; and that principle followed out would certainly apply in a case like this, where the domicil into which she has married has never undergone a change, where there has been no divergence of cohabitation or residence, and where the crime was committed in the country both of the domicil and of the forum. It would appear, therefore, that if this question is to depend on any principle at all it must be upon the principle of recognising the law of the forum and matrimonial domicil, when, as in this case, they both concur.

Let us now see how the matter really stands upon the authorities. There are a number of different cases which may be mentioned, and which may be distinguished from each other; but as far as I know there are only two or three cases, among those mentioned at the Bar, which present concurrently all the circumstances relied upon for the foundation of the jurisdiction in the present case.

It is said that those circumstances existed in the case of *M'Carthy* v. *Decaix* (1), because there the solemnization of the marriage was also in England but the husband was a Dane. As I collect, the parties lived together in Denmark as long as they lived together at all, and in the Courts of Denmark, while they both lived there, a sentence of divorce was pronounced. That sentence was not for a cause which even under our present law would be recognised in England—it was for what abroad is called, or at least that is our English translation of the foreign legal term, incompatibility of temper. But except as to the nature of the cause of divorce that case would seem in its original facts to have been like the present. It is said that Lord

(1) 2 Russ. & My. 614.

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Brougham, in the case of *M'Carthy* v. *Decaix* (1), decided that because the solemnization of the marriage with an English woman had taken place in England, therefore the Danish Court could not under those circumstances dissolve the marriage. I have all due respect for the judicial decisions of all who have at any time filled the office of Lord Chancellor. I have great respect for the high reputation of Lord Brougham; but I am compelled to speak without much respect of the decision in *M'Carthy* v. *Decaix* (1); not only because it appears to me to proceed upon a view of *Lolley's Case* (2) which is not really tenable, but also because it is a decision which, upon principles universally recognised, would be incapable of being supported even if it were true that the English Court ought not to have recognised that Danish divorce; because beyond all doubt on that supposition both the husband and the wife lived and died domiciled in Denmark, and the distribution of both their personal estates would, by a law which is beyond controversy, fall to be regulated in England and everywhere by the law of Denmark, and not by the law of England; and therefore, unless it had been ascertained that the law of Denmark under those circumstances would not distribute those estates in the same manner as if there had been a valid divorce, the decision manifestly lost sight of the true question in the cause. I do not, therefore, think it necessary to say more about the case of *M'Carthy* v. *Decaix* (1). It has been commented upon on various occasions in a manner certainly tending to shake its authority; but to my mind nothing more is necessary to destroy its authority than to bear in mind the fact that even if the English Courts ought to have declined to recognise in that case the Danish divorce, still the English Courts could not with propriety have applied the English law to the case, because the distribution of the movable property in question depended entirely upon Danish law, and the English Courts were bound to treat it as depending upon Danish law.

Therefore the case of *M'Carthy* v. *Decaix* (1) may be put aside. I am not quite sure, but I think that in the case of *Geils* v. *Geils* (3) the circumstances were also parallel with those of the present case;

(1) 2 Russ. & My. 614.
(2) Russ. & Ry. 237.
(3) 1 Macq. 255; 13 Court Sess. Cas. 2nd Ser. 321.

because there, if I am not mistaken, not only was the Scotch matrimonial domicil unchanged at the time of the divorce, but I think the adultery was committed in Scotland, and at the time of the action brought, the husband, against whom it was brought, was resident in Scotland. In that case the decision of the Scotch Court was upheld upon an appeal from Scotland to this House. No doubt that by itself does not prove that an English Court ought also to have recognised the validity of the decision; but having regard to what has constantly fallen from the judges who in this House have determined questions of that kind with reference to general principles, I think the presumption is that an English Court ought, unless some reason, which at present I am unable to perceive, be shewn to the contrary, to recognise the decision of a Scotch Court in a case in which this House has held that the Scotch Court had proper jurisdiction to pass such a sentence.

The third case is *Maghee* v. *M'Allister* (1), a case in Ireland before Lord Chancellor Blackburne. There, as in the Danish case, the cause of divorce was one which would not be sufficient in England (desertion and non-adherence), but the parties there also had been from the first matrimonially and actually domiciled in Scotland. They were not both in Scotland when the action was brought, and that makes it stronger. I rather think that the cause of action arose out of the fact that the wife, against whom the action was brought, had withdrawn herself and she was living elsewhere. Nevertheless the jurisdiction was upheld on the same principles on which this House upheld the Scotch jurisdiction in *Warrender* v. *Warrender* (2), where the matrimonial domicil had all along been Scotch, but the crime was alleged to have been committed out of Scotland, and the wife was resident out of Scotland. Still this House held, in a Scotch appeal undoubtedly, that the Scotch Court had proper jurisdiction; and the Lord Chancellor of Ireland, under circumstances similar in principle, held that an Irish Court ought upon principle, according to the comity of nations, to recognise the competency of the Scotch jurisdiction to pronounce the divorce which had been pronounced in *Maghee* v. *M'Allister* (1).

I believe that those are the only cases which are in their mate-

(1) 3 Ir. (Ch.) 604. (2) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.

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rial circumstances exactly like the present. Much of illustration and of valuable and important doctrine is undoubtedly to be found in other authorities. I will just glance at some of those authorities in order to see precisely what they do and what they do not determine. I will begin with *Lolley's Case* (1).

Now what was *Lolley's Case?* (1) It was a case of this class, that persons who had married, and had always been and always continued to be matrimonially and actually domiciled in England, had recourse to Scotland for the purpose of constituting a merely forensic domicil, and there obtained a divorce for a crime, I take it, committed in Scotland. That was held by the English Courts not to be a valid sentence. I do not myself think that there was any very great hardship upon Mr. Lolley, the husband, because, whether there was collusion on the part of his wife or not, it is quite certain that he went through the whole proceeding in order to get rid of his wife and marry another woman with whom he had already entered into a conditional engagement. But there was a total absence of matrimonial or actual domicil. We need not consider whether a change of domicil would or would not have been sufficient—the domicil was throughout English, and the recourse to Scotland was merely for the purpose of getting rid of the marriage. That case decided, and every subsequent case is consistent with the decision, that in those circumstances the Scotch Court had no proper jurisdiction, or at all events, not such a jurisdiction as could be recognised for the purpose of giving any effect to its sentence in England.

There arose a somewhat similar question in the case of *Tovey* v. *Lindsay* (2), and it is remarkable that there Lord Eldon did in the course of the argument, according to the report which I hold in my hand, once or twice, before he came to deliver judgment, express himself in terms not different from those used at your Lordships' bar by the learned counsel for the appellant as to the point decided in *Lolley's Case* (1). He is reported to have said, on page 124 of the report, that the "twelve Judges had lately decided that as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by an Act of the Legislature;" which is very much the way in

(1) Russ. & Ry. 237. (2) 1 Dow. 117, at p. 124.

which Mr. Benjamin put it. And, again, on the top of the next page, "You say that the marriage ought to be dissolved; her answer to that is, that being contracted within the pale of the English law it is indissoluble." So that Lord Eldon, during the argument, once or twice expressed himself, with regard to *Lolley's Case* (1), in the terms of the appellant's argument in this case; but when he came to deliver his judgment it is quite plain that upon mature consideration he saw reason to take a different view. The material facts there were these. The original domicil of the husband was Scotch; he had afterwards lived a good deal in England, particularly at Durham; he had separated from his wife, his wife remained in Durham, and he afterwards sued her for a divorce in Scotland, she being out of the jurisdiction. The Scotch Courts had treated it as a confessedly Scotch domicil. Lord Eldon in the whole of his judgment treats domicil as the point upon which the question ought properly to depend, not however ultimately deciding anything, and certainly not deciding the very important question which might have arisen if the change to an English domicil had been established, namely, how far a subsequent change of domicil would affect the jurisdiction to dissolve the marriage; but he considered the fact of domicil to be necessary to be ascertained, which according to the view of *Lolley's Case* (1) taken by the appellant's counsel at your Lordships' Bar could not have been necessary at all. Therefore I think we may infer very clearly that in Lord Eldon's mind it could not be determined offhand that the Scotch Court had no jurisdiction, merely on the ground that the marriage had taken place in England.

Then I come to observe upon two other classes of cases, or rather one other class, because *Dolphin* v. *Robins* (2) and *Shaw* v. *Gould* (3) seem to me to be very nearly the same in their circumstances as *Lolley's Case* (1), and I therefore will not dwell upon those cases. The other class of cases is that which was last mentioned, namely, *Niboyet* v. *Niboyet* (4), where the forum which dissolved the marriage was not that of the matrimonial domicil, but was that of the bonâ fide residence of both parties, both being

(1) Russ. & Ry. 237.
(2) 7 H. L. C. 390.
(3) Law Rep. 3 H. L. 55.
(4) 4 P. D. 1.

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within the jurisdiction, and the crime having been committed there. Now, if that case was well decided, it is certainly not an authority in the appellant's favour; because it goes to this length, that at all events under the English statute, if those circumstances are found concurring, even domicil is not necessary to give jurisdiction to dissolve a marriage. Whether another country, the country of those parties (France I think) would have recognised that decision, we need not at present inquire, because either it is applicable on the present occasion, or it is not—if it is applicable it is certainly an authority against the appellant—if it is not applicable it does not help her.

The case of *Pitt* v. *Pitt* (1), no doubt, was one which did not present the same circumstances which your Lordships have to consider here; because in *Pitt* v. *Pitt* (1), in which this House on an appeal from Scotland reversed an order which had affirmed the jurisdiction of the Scotch Court, and therefore determined that the Scotch Court had no jurisdiction, the circumstances were these: The matrimonial domicil was English—the solemnization of the marriage was in England—Col. Pitt, the husband, had gone to Scotland; it was in controversy whether he had there acquired an actual domicil or not, but it was decided that he had not. He therefore retained his English domicil. The wife was not in Scotland, and the alleged adultery was not committed in Scotland. In those circumstances the House came to the opposite decision from that which it had arrived at in *Warrender* v. *Warrender* (2), the circumstances being very parallel, except that in the one case there was, and in the other case there was not, a Scotch domicil. In *Warrender* v. *Warrender* (2), where there was under those circumstances a Scotch domicil, the jurisdiction was upheld, though the crime had not been committed in Scotland, and though the wife, who was the defender, was not resident in Scotland. In *Pitt* v. *Pitt* (1) the jurisdiction was denied, because there was not a Scotch domicil, the other circumstances being the same.

Now, my Lords, I do not say that the case of *Pitt* v. *Pitt* (1) would of necessity govern cases like *Niboyet* v. *Niboyet* (3), for example, if they were to arise in Scotland. That is not a question

(1) 4 Macq. 627.

(2) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.

(3) 4 P. D. 1.

which your Lordships have now to determine, and it is not desirable that you should go beyond the case which you have to determine; but this I will say, without going through the authorities or all the cases which have been cited, that when they are carefully examined you find that the current of judicial opinion which pervades them is in favour of regarding and not disregarding international principles upon this subject, when you do not find the positive law of the country of the forum in conflict with those principles, unless *M'Carthy* v. *Decaix* (1) may be considered to be an exception. The present decision in the Court of Appeal is in accordance with international law, and with the whole stream of sound authority, including Lord Lyndhurst, Lord Brougham himself (though no doubt, from the view which he took of *Lolley's Case* (2) he not unfrequently contended against it in terms which your Lordships probably would not adopt), Lord St. Leonards, Lord Westbury, Lord Cranworth, Lord Chelmsford, and Lord Kingsdown, all of whom concur. I have no hesitation in saying that, from the passages which have been read from the judgments of each and every one of those noble and learned Lords, I should confidently infer that, if the present case had been argued before all or any one of them, they would have concurred in the judgment which I now move your Lordships to pronounce, which is that the present appeal be dismissed with costs.

LORD BLACKBURN :—

I am entirely of the same opinion. I agree in almost everything that has been said, and I should hardly consider it necessary to add anything if it were not that I wish to point out that the only question that we have to decide at present is that in this case the divorce was good, that the Court in Scotland had under the circumstances of this case the proper power to divorce, and that that divorce put an end to the marriage. Several cases were cited and arguments used for the purpose of shewing that in some cases a divorce might not have been good where there was not so much ground for it as there is here. That, I apprehend, we have

(1) 2 Russ. & My. 614. (2) Russ. & Ry. 237.

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not to consider. It is no objection to this being a good divorce and putting an end to the marriage in this case to say that there might be cases in which the facts did not go so far and in which a divorce might not be good according to some of the decisions. That would not at all affect the present decision, which is that in the present case there is enough to do it.

Let us now see what the present case is. A Scotchman domiciled in Scotland, and being to all intents and purposes a Scotchman, comes to England and there marries an English wife. She was an Englishwoman up to the moment of her marriage. The marriage took place in England according to the forms of English law, and from the moment of her marriage she became a domiciled Scotchwoman just as her husband was a domiciled Scotchman. There was nothing whatever to change that domicil; and whilst they were both in Scotland there was a divorce by a Scotch Court from the marriage, a dissolution à vinculo matrimonii on the particular ground of an offence committed in Scotland. Now the question is, Is that divorce good in England? Is it according to English law that a dissolution of marriage by a Scotch Court under those circumstances is a good dissolution of marriage in England? Whether it would have been good in Scotland or not would not have been the same question. I can easily suppose that there might be good divorces in Scotland that would not be good in England. The question is whether this is good in England.

Seeing that there was this complete domicil, which almost every writer and speaker upon the subject has regarded as certainly the most important element in considering what the status of married people is, and the status of those divorced from a marriage (this was in its origin a Scotch domicil from the very beginning), the only ground upon which it has been said that a Scotch Court could not divorce the parties was that the actual marriage, the contract, was made in England. I do not myself see why upon any principle that should make any difference. What was urged was that there was authority for that proposition, and for that purpose *Lolley's Case* (1) was cited.

Now Lord Brougham did more than once cite and act upon

(1) Russ. & Ry. 237.

Lolley's Case (1), as though he had understood it as going to the full extent of what I have just said, that the fact that a marriage was contracted locally in England made it an English marriage, and therefore indissoluble by any foreign Court on the ground of adultery or anything else. Lord Brougham appears to have thought that that was the decision in *Lolley's Case* (1), but I think that that was not the decision. When you look at the facts in *Lolley's Case* (1) they are clear. An English husband married an English wife in England; he was a domiciled Englishman, she was a domiciled Englishwoman. They continued to be domiciled Englishman and Englishwoman down to the moment when, going into Scotland for a temporary purpose, he there committed adultery, and she, therefore, caused him to be divorced in a Scotch Court. Now in that state of facts the point which was decided by the twelve Judges, upon the point being brought forward, was this. They said they could not and would not inquire into whether there was fraud or not, because if there had been any fraud it ought to have been left to a jury to find it and that the fraud was not left to a jury; but they did find upon the very point that was brought before them, and which they had before them, that there was an English domicil throughout the whole period of the case, and when they decided that an "English marriage," which, I think, is the phrase that was used, was indissoluble by a foreign Court, I think they meant an English marriage under these circumstances and in this way, namely, one where the domicil was English from the beginning to the end of the transaction. Lord Brougham certainly did not understand it so, and more than once in his anger against *Lolley's Case* (1) he was inclined to maintain that *Lolley's Case* (1) was decided upon the ground of the contract being English, and to drive it to absurd results, a reductio ad absurdum, to shew that *Lolley's Case* (1), as he understood it, was wrong and could not possibly be right; but there is no case that I am aware of which says that *Lolley's Case* (1), as I have just put it, was not right. There is no case which either in Scotland or in this country decides finally that even in Scotland a divorce under such circumstances as those of *Lolley's Case* (1) would be good. Whether upon the authorities it might not be

(1) Russ. & Ry. 237.

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decided hereafter (it has not yet been decided) that a divorce in Scotland in such circumstances as those of *Lolley's Case* (1) would not be valid even by Scotch law is a point which does not arise in the present case, and upon which I wish to express no opinion either one way or the other.

Assuming that in *Lolley's Case* (1) the divorce would be good in Scotland, it would not be to my mind a very uncomfortable result that it should be good in Scotland and bad in England; but it does not, to my mind, prove at all that this case was not rightly decided. We have not even to consider whether or not a divorce under the circumstances of *Lolley's Case* (1) would in England be bad, but whether a divorce under the circumstances of this case would be bad because it might have been shewn to have been void in *Lolley's Case* (1) under the circumstances of that case. The validity of the divorce in *Lolley's Case* (1) is not the question which is now at all before your Lordships.

Several of the other cases which were cited, such as the case of *Niboyet* v. *Niboyet* (2) would only, I think, at the utmost go to this, that there may be grounds (I do not inquire whether they would be good or bad grounds) for saying that a divorce may be good and valid, and ought of course to be valid in every country if it is valid in the country where it is pronounced under circumstances which go the length of these. There was a difference of opinion in that case and I wish to express no opinion upon it one way or the other, but supposing it were valid, going even further than this case, how can that be an authority for saying that it is not valid when the circumstances only go as far as they do here?

Now, I need not repeat what has been said with regard to Lord Brougham's expressions. I can only say that weighing them, not as authorities binding upon me, but, merely as expressions of Lord Brougham's opinion, his reasoning in the cases which have been cited does not carry much weight or influence in my mind. And the authority of the Lord Chancellor Blackburne (3) certainly seems to me to decide exactly the contrary. It appears to me that he was quite right in his decision upon the facts before him,

(1) Russ. & Ry. 237.
(2) 4 P. D. 1.
(3) *MacGee* v. *M'Allister*, 3 Ir. Ch. D. 604.

and he gives very good grounds for it. I think his decision is in conformity with all that has been thrown out by various judges at different times. Without going further than that, and without entering into the question and saying whether a bonâ fide change of a domicil which was originally English would affect the question or not, I say that it seems to me that there is no authority, except Lord Brougham's, against the proper doctrine which is now laid down by the Court below in the present case, but that there is every authority, except Lord Brougham's, going the other way.

I must observe one thing further. I should have said it, perhaps, a little earlier. I think when you come to look at the expressions which, in a case decided immediately after *Lolley's Case* (1), namely, *Tovey* v. *Lindsay* (2), Lord Eldon used with reference to *Lolley's Case* (1), you find that although Lord Brougham had given a report of that case in which he said that it was held that a marriage was indissoluble in Scotland when contracted in England, Lord Eldon, before he come to deliver judgment, saw that the decision in *Lolley's Case* (1) was that it was indissoluble when it was an English domiciled marriage ab initio down to the time of the divorce. All that was done in that case was to send the cause back again to Scotland in order that the Scotch Courts might consider with great care before they decided that they had the power to divorce under circumstances which raised such questions as those involved in that case. Namely, the effect of the domicil of origin having been Scotch; and apparently continuing such when the marriage was contracted locally in an English colony. And then the domicil being changed to England, and then after a separation the husband renewing his original domicil. It appears that the party died shortly afterwards, and it was not decided then and I do not think it was ever finally decided by the Scotch Courts; at all events, I do not think it would be proper now for your Lordships to form the opinion that that question was decided. I think that all that should be decided here is this, that upon such facts as are here stated the Scotch Court had power to direct a divorce which should be valid everywhere.

(1) Russ. & Ry. 237. (2) 1 Dow. 117.

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LORD WATSON:—

I am of the same opinion. In this case it has not been disputed by the appellant, that according to the decisions of this House in Scotch appeals the Court of Session had, by the law of Scotland, jurisdiction to pronounce a sentence of divorce between these parties in December, 1863. But the question which is raised for determination is this, whether that decree must be respected by the Courts of England, or whether it must be set aside as an invalid decree because it dissolves an English marriage.

Now, I must say that to my mind it would be contrary to the plainest principles of international private law as expounded by noble and learned Lords of the highest judicial eminence, in a series of decisions in this House, beginning with the case of *Warrender* (1) in 1835, and ending with the case of *Shaw* v. *Gould* (2) in 1868, to give effect to the contention which has been addressed to your Lordships on behalf of the appellant.

But then it is said that those decisions, which establish the rule that questions affecting the *status* of married persons must be determined according to the law of the husband's domicil, have no application here; and that the present case falls to be decided not upon general principles of international law but upon a certain principle which is peculiar to the law of England. That principle as explained by the learned counsel for the appellant is neither more nor less than this, that whenever a marriage takes place in England between a foreigner and an English lady the law of England regards the place of celebration as determining the status of the spouses, as fixing within England the jurisdiction and the only jurisdiction to dissolve the marriage and alter the status of the parties from that of married to that of single persons. My Lords, for that proposition no authority has been cited either concurrent with or subsequent to the long series of decisions to which I have already adverted. But it is said that it was so settled in *Lolley's Case* (3), approved of in *Tovey* v. *Lindsay* (4) and followed in *M'Carthy* v. *Decaix* (5). I agree with every word that has fallen from your Lordships in regard to

(1) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(2) Law Rep. 3 H. L. 55.
(3) Russ. & Ry. 237.
(4) 1 Dow. 117.
(5) 2 Russ. & My. 614.

what was decided in *Lolley's Case* (1). I think that it is by a mere play upon the words "English marriage" that the appellant's counsel has given a show of plausibility to his argument. These words "English marriage," are capable of two very different meanings, and may be understood either as signifying the substance of the contract or union between the parties out of which their rights as spouses arise, or as signifying the mere place of celebration. I cannot think that in remitting the case of *Tovey* v. *Lindsay* (2) Lord Eldon had in view that they meant merely the place of celebration of the marriage. It is very remarkable, if that opinion was in his Lordship's mind, that he should have remitted the case to the Court of Session to consider not whether the Court in Scotland had power to dissolve a marriage celebrated in England, but to consider whether their judgment was well-founded in respect to the domicil of the parties. The only difficulty or doubt upon which the case was remitted was this, that it appeared to the noble and learned Lord that there was great room for difference of opinion as to the fact of the pursuer being domiciled in Scotland at the time. He asked the judges in Scotland to consider that matter, whether he was not really domiciled in Durham and not in Scotland, as they had assumed in their judgment; and in the event of their coming to the conclusion that the pursuer's domicil was English, he directed them carefully to consider the law bearing upon the point.

Then, my Lords, so far as regards the case of *M'Carthy* v. *Decaix* (3), I think that there are considerations arising upon the face of that judgment which render it of very little value as an authority; and even if it had been a decision more in point than it seems to me to be, I should not have been inclined to follow it in the face of those very weighty observations which have been made by judges, as I have already said, entitled to the highest respect, in subsequent cases.

I shall only say, farther, that throughout the argument in this case I have felt very little doubt as to the result at which your Lordships ought to arrive; because from beginning to end that argument has been a hopeless endeavour to shew that the

(1) Russ. & Ry. 237. (2) 1 Dow. 117.
(3) 2 Russ. & My. 614.

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words "English marriage" were intended throughout these cases, by the Judges who used the expression, to designate mere celebration.

Fooks, for the appellant, asked that the appeal might be dismissed without costs.

LORD SELBORNE, L.C.:—That will probably depend upon whether security has been given or not. If it has been given, the persons who gave the security will have to pay the costs, and they must get them in the best way they can. [The register of appeals was then sent for, and his Lordship having examined it, said:]—My Lords, I find that there was a petition presented by the appellant in this case praying that the usual security for costs might be dispensed with, and the agent for the respondent consenting thereto, the order was made as prayed. I think that under those circumstances, my Lords, our order ought to be without costs.

Order appealed from affirmed; and appeal dismissed without costs.

Solicitor for appellant: *Savile A. Tucker.*
Solicitor for respondent: *J. S. Ward.*

[HOUSE OF LORDS.]

OAKBANK OIL COMPANY . . . . . APPELLANTS; H. L. (Sc.)
CRUM . . . . . RESPONDENT. 1882
Dec. 12.

Public Company—Payment of Dividends in "proportion to Shares"—Shares fully and partly paid up—Participation equally in Dividend—Construction of Articles of Association—Companies Act, 1862 (25 & 26 *Vict. c.* 89), 1*st Schedule, Table A, Reg.* 72; *and Companies Amendment Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 24, *sub-s.* 3.

The capital of a company, incorporated under the Acts of 1862 and 1867, consisted of 60,000 shares of £1; 40,000 were fully paid-up, and 20,000 to the extent of only 5*s.* per share. By the 71st article of association the directors may "declare a dividend to be paid to the members in proportion to their shares." By the definition clauses the word "capital" was declared to mean the capital for the time being of the company, and the word "shares" the shares into which the capital is divided. In a question whether the directors could competently recommend a dividend payable to each shareholder in proportion to the amount paid up upon the shares held by him:—

Held, affirming the decision of the Court below, that such a declaration of dividend was incompetent, because upon the true construction of the articles of association, read with the Acts of 1862 and 1867, all the shares were entitled to participate equally in dividend, without regard to the amount paid up upon each.

See opinions of the Lords at pp. 74, 77, 99, as to the effect of sub-s. 3, s. 24, of the Companies Amendment Act, 1867.

APPEAL from a judgment of the First Division of the Court of Session, Scotland, on a special case.

The Oakbank Oil Company, Limited, was incorporated under the Companies Acts, 1862 and 1867. The nominal capital of the company under its memorandum of association as registered was declared to be £20,000 in 400 shares of £50 each. On the 16th of November, 1869, that capital was increased by special resolution by the addition of 400 shares of £50; and the whole of the capital of the company was called up

On the 21st of February, 1873, by a series of special resolutions it was resolved that the capital should be divided into 40,000 shares of £1 each.

On the 6th of July, 1875, the capital was further increased by

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the issue of 20,000 new shares at £1. Calls were made on these shares, but only to the extent of 5*s.* each. Thus the aggregate capital became 60,000 shares of £1 each, of which 40,000 were fully paid up, while 20,000 were paid to the extent of 5*s.* per share. Both before and after the last issue the company has sanctioned the payment of dividend at the rate of so much per cent. on the paid-up capital.

On the 17th of May, 1881, the respondent, a recent purchaser of fifty of the last issue, intimated to the company that he intended to challenge the principles on which dividends had hitherto been allocated, and vindicate his right to be paid an equal dividend with those whose shares are fully paid up, on the ground that the directors were limited in the matter of payment of dividend by the articles of association of the company; and on a sound construction of these articles dividend must be paid in proportion to the share in the nominal capital held by members, which is synonymous in this case with the payment to them in proportion to the number of their shares.

On the 17th of May, 1881, the directors passed the customary resolution. The respondent not being at the time registered as a shareholder could not participate in the proceedings; but it was agreed he should not be prejudiced by not taking proceedings to interdict the payment of that dividend. As soon as the respondent was registered the question was raised on a special case arranged between the company and the respondent.

The questions submitted for the opinion of the Court were as follows: "Whether the second party (the respondent) as the holder of the shares on which only 5*s.* per share has been paid up, is entitled to claim that all dividends declared shall be declared in proportion to the number of shares held by members without regard to the amount paid upon said shares; or whether it is within the powers of the directors to recommend and of the company to sanction a dividend payable to each shareholder in proportion to the amount paid up upon the shares held by him.

The material clauses of the articles of association were as follows:—

(1.) The Oakbank Oil Company, Limited, is established . . . . in accordance with and subject to the provisions of the Companies Acts 1862 and 1867, but

none of the regulations in Table A in the first schedule appended to the first-mentioned Act, except in so far as such regulations are embodied in these articles, shall be applicable to the company . . . .

In the construction of these articles the word "company" shall mean . . . . the word "capital," the capital for the time being of the company; the word "shares," the shares into which the capital is divided, &c.

(4.) The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares.

(6.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amounts of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

(22.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interest in such stock; and such interest shall in proportion to the amount thereof confer on the holders thereof respectively the same privileges and advantages, for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company . . . .

(23.) The directors may, with the sanction of a special resolution of the company . . . . increase its capital by the issue of new shares . . . .

(41.) Every member shall have one vote for every share held by that member.

(71.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

On the 2nd of December, 1881, the First Division (1) found

(1) LORD SHAND said:—"It has been truly enough represented that if those shareholders who have paid 5*s.* on their shares are to receive profits only on the amount paid up, they are practically getting no adequate return for the risk they run, and for the fact that the business of the company has been carried on, it may be, to a considerable extent on their credit. I think there is a stronger equity, however, in the view that a shareholder who has paid only 5*s.* on his shares, and has had the other 15*s.* per share in his pocket for use either by trading or drawing interest upon it, has an undue advantage over the other shareholders in the receipt of dividends, if he draw dividends on his unpaid capital. But I do not think these are considerations which can be allowed to have very great weight in the decision of this question, which, after all, is one of the construction of the articles of association."

And he went on to say, agreeing with the Lord President (Inglis):—

"Now, reading article 71st in full—that is to say, incorporating in it the words which we find in the interpretation clause as to the meaning of the word 'shares'—the article reads in

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that the respondent, as the holder of the £1 shares on which only 5*s.* per share has been paid up, is entitled to claim that all dividends declared shall be declared in proportion to the number of shares held by members, without regard to the amount paid up on said shares (1).

On appeal,

Dec. 12. *Benjamin*, Q.C., and *Buckley*, contended for the appellants that the result of the judgment of the Court below was inequitable in its operation, and contrary to the natural meaning of the articles of association. Article 6, which is in the exact words of article 7 first schedule table A. of the Act of 1862, enabled a shareholder, whose capital is not wholly paid up, to pay the residue and receive interest; then construing the article 71 in the way it had been done, the result was that those who had been asked to pay up in full only received dividend, while holders of the last issue, assuming they lent to the company, get both dividend and interest.

Article 71, is a copy of article 72, first schedule table A, of the Act of 1862, is merely permissive; and the actual course of dealing had been sanctioned for five years by the company. The word "shares" in that article could not be taken to mean the "shares into which the capital is divided;" which is the definition in article 1. A "share" as there defined is simply that thing which bears a particular denoting number, the "share" as thus defined may be £1 or £50. They submitted the word "shares" there, in fact, meant "interest," and the shareholder's "interest" in the concern is measured by what he has paid, not by what he has contracted to pay.

The Act of 1867 was more in their favour than against them. The decision in *Hutton* v. *Scarborough Cliff Hotel Co.*, 1865 (2), was

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this way: 'The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to the shares belonging to them into which the capital is divided.' I think the plain literal meaning of these words is that you are to look to the proportion of the nominal capital stock which each shareholder holds, and divide the profits accordingly in proportion to the shares which the partners respectively hold in the nominal capital stock of the company."

(1) 9 Ct. Sess. Cas., 4th Series, 198.

(2) 2 Dr. & Sm. 514, at p. 521.

11 Jur. N.S. 849.

that a company which had not by its articles of association power to issue preference shares, could not do so under the authority of a special resolution. This involved that if a company accepted from one shareholder a larger payment than from others it could not pay him dividend upon it. The Act of 1867, s. 24, therefore contains provisions to meet this (1). This is the meaning of that Act, and there is not to be found in it by implication or otherwise any statutory recognition of a rule that dividends are to be paid on capital subscribed as distinguished from capital paid up.

Their further argument is fully alluded to in the opinions of the Lords.

[They commented on Lindley on Partnership (4th ed.), vol. i. pp. 676, 679, 797, which refers to *Somes* v. *Currie* (2).]

The Solicitor-General for Scotland (*Asher*, Q.C.), and *Rigby*, Q.C., for the respondent, were not heard.

LORD SELBORNE, L.C.:—

My Lords, in this case your Lordships, having heard the able and exhaustive arguments which have been addressed to the House by the learned counsel for the appellants are, I believe, of opinion that it is not necessary to call upon the learned counsel for the respondent.

The question depends, I think, entirely upon the true construction of the contract contained in the memorandum and articles of association of this company. It is unnecessary to determine whether the à priori arguments on the one side and upon the other exactly balance each other, or whether in the absence of express terms in the contract one à priori argument

(1) The material portion of the 24th section of the Act of 1867 is in these terms:—"Nothing contained in the principal Act shall be deemed to prevent any company under that Act, if authorized by its regulations, as originally framed, or as altered by special resolution, from doing any one or more of the following things, viz.: (1) Making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls . . . . (3) Paying dividend in proportion to the amount paid up on each share in cases where a larger amount is paid upon some shares than on others."

(2) 1 K. & J. 605.

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would preponderate over another. If we had to consider what was à priori a reasonable contract as to dividends in a company of this sort, much might very reasonably be urged against the proposition that if a man made himself liable for, say, £100, or whatever might be the nominal amount of his shares, in the event of his money being required to pay the liabilities of the company, he should be treated as having no interest in the profits of the company, except to the extent to which the sum for which he had made himself liable was actually called up and paid. Under these particular articles, which I for this purpose refer to only by way of illustration, I do not see that it was necessary that anything should be called up, in the case of the newly-issued shares at all events, unless the directors thought fit to do so; because there is no provision making that obligatory, at least I have not observed one. But it does not make much difference whether nothing is called up or only sums of an insignificant amount; the whole liability remains to the extent to which it has not been satisfied by paying it; and to say that a man may make himself liable to a large amount for the engagements of the company, which he may eventually be called upon to pay, and that he has, until he has actually been called upon to make that payment, no interest which can possibly make it reasonable that he should share in a dividend in respect of what has not been paid up, does not seem to me to be a proposition so plainly and obviously reasonable as to make it wise to approach the construction of any instrument with the presumption that this must certainly be its meaning. On the other hand, I freely allow that there is a great deal to be said for the mode of paying dividends in proportion to what has actually been paid up, which the Act of Parliament of 1867 shews may sometimes be a proper thing to provide for, and which at all events may lawfully be provided for. I will not observe upon what Lord Shand says, nor express an opinion as to the balance of probability; but, allowing that there is a great deal of reason in the argument that it is a fair thing that the dividends should bear some relation to what has been paid up, I still think, that we cannot decide the case upon any à priori argument at all; we must see what the actual contract is. Each party must be taken to have made himself acquainted with the terms of the written

contract contained in the articles of association, and the Acts of Parliament, so far as they are important. He must also in law be taken (though that is sometimes different from what the fact may be) to have understood the terms of the contract according to their proper meaning; and that being so he must take the consequences, whatever they may be, of the contract which he has made.

That being so, the question before your Lordships really depends upon the construction of the words, "a dividend to be paid to the members in proportion to their shares," as they occur in the 71st article of association of this particular company. My Lords, if the effect be one which is unsatisfactory to the company, it is possible, as the Court below has thought, that with regard to any future dividends to be paid by them they may alter that article of association and take power to declare a dividend of a different character, to be paid, it may be, upon what has actually been paid up upon the shares; but at all events they have not altered the article, if they have power to do so, and your Lordships must decide this question upon the articles as they stand.

Now, I will first notice an argument of Mr. Benjamin founded upon the word "may" in that article 71: "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." As I understood the argument it was this, that there would be a power to declare a dividend, though nothing was said about it; and that therefore the word "may" there, which is permissive, must be taken to mean that if the directors like the dividend which they declare to be paid in proportion to the shares they may so declare it, but that it does not exclude them from the power of directing it to be paid in some other manner. My Lords, I cannot accede to that argument. It appears to me that directors and general meetings of companies of this sort can have no powers by implication except such as are incident to, or properly to be inferred from, the powers expressed in the memorandum and articles of association. Their powers are entirely created by the law and by the contract founded upon the law which enables such companies to be constituted. Therefore I think the word "may" means, that if the directors get the assent of a general meeting they may declare a dividend; but that is not to be any

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kind of dividend, it is to be a dividend of that kind which the clause contemplates, namely, "a dividend to be paid to the members in proportion to their shares." If a dividend is declared it must be (whatever is the true construction of those words) one in which the members will participate in proportion to their shares.

Then the whole question is, What is the meaning of the words "in proportion to their shares"? I have looked, as far as I could, through the whole of these documents, the articles of association and also the memorandum of association, and I find the word "shares" continually occurring throughout both documents. In the memorandum "the nominal capital of the company" is "£20,000 in 400 shares of £50 each." That was at a time when nothing could have been paid up, and when the word "nominal" was used with strict propriety, because the capital was not yet subscribed, or at all events not subscribed by any others than those persons whose names were underwritten to the memorandum, whose shares amount to a very small proportion indeed of that sum. In the fundamental document of the company the word "shares" is used to signify the aliquot parts of the £20,000, the original nominal capital.

Then we come to the interpretation clause. The interpretation clause in the articles says that generally where there is nothing repugnant in the context the word "shares" is, in the articles, to have a meaning substantially the same as that which it has in the memorandum, as might be expected—that it shall mean "the shares into which the capital is divided." It was justly observed by the learned counsel who so ably addressed your Lordships (Mr. Buckley), following Mr. Benjamin, that the word "shares" there depends upon the word "capital;" but he would not contend that there or elsewhere in the articles the word "capital" meant that part of the subscribed capital which might have been paid up or called up for the time being as distinct from that part which had not.

I will not go through all the clauses of the articles of association, but there are many relating to shares and to the circumstances in respect of which shares confer privileges or powers or obligations, and I cannot find a single place in which there is any context suggesting a different sense of the word "shares" from

that which the interpretation clause mentions. The very clause which has been so much relied upon in argument as furnishing reasons against the application of that sense to the 71st section, namely the 6th, appears to me to be an instance of the same use of the word. The 6th clause says, "The directors may, if they think fit, receive from any member willing to advance the same, all or any part of" what? "The moneys due upon the shares held by him beyond the sums actually called for"; and then "upon so much of the moneys so paid in advance as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest." What is the meaning of the word "shares" there? Shares in the subscribed capital, not the part which has been paid up, or the part which has not been paid up, but manifestly the whole of the subscribed amount of the shares, of which part has not been paid up. Therefore that clause, as it appears to me, instead of contradicting the interpretation placed upon the 71st section by the Court below, confirms it; and although it may be true that it might be an improbable thing, (if, in a case in which the calls were unequal, the dividend must be equal between different classes of shareholders,) that the directors should use the power of taking in advance at interest from a member the part not called up upon his shares, yet there is the power, and I am not satisfied that it can be limited to original shares as distinct from shares subsequently issued. If the money has not been advanced to the company, and therefore does not carry interest, still it may be making, and probably will be making, interest or profit in the hands of the shareholder; and if equality in respect of dividend (supposing the dividend to be equal) is not an obstacle to the natural and literal interpretation of the 71st section, I do not see any obstacle in the fact that instead of making interest elsewhere the shareholder would receive interest from the company for paying voluntarily what he is not obliged to pay. I cannot see how that can make any difference.

And with regard to the suggested mode of interpreting the words "in proportion to their shares," as applying to the shares which are numbered in the company, I venture to think that that is a fallacy. The particular numbers, which are used

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for the purpose of identification and transfer, and to keep the shares from being improperly dealt with, are immaterial for this purpose, inasmuch as this clause does not look to any of those objects, nor does it look to each share separately and singly, but it looks to the aggregate amount of shares held by those persons who are to receive the dividend. That aggregate amount is determined by two things, first, by the amount of each share, and then by the amount of all the shares held by the shareholder put together as compared with those held by others.

I do not think that it is necessary to found anything upon the Act of 1867; but I may say, that, without some express authority in the original regulations of the company or in regulations which the company was enabled to make by way of alteration, primâ facie there would not be a power to pay a dividend in proportion to the amount paid up on each share in cases where a larger amount was paid on some shares than on others. The fact that the Legislature thought it necessary in 1867, five years after the original Act, to declare it expressly, and to make that power dependent upon authority to be found in the company's regulations either as originally made or as altered, is, to say the least, decisive against the supposition which your Lordships are asked by the Appellants' counsel to make as to the Act of 1862, the words of which are exactly the same as those which you have in this article, "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." Those words are found in the model set of articles in Table A, which (unless excluded) was to enter into the constitution of every company formed under the Act. The Appellants say that under the Act of 1862 they can do the very thing which in 1867 it was thought necessary to give express power to do, and the power to do which was then made to depend upon the authority contained in the company's regulations. I can only say, that, having arrived at the conclusion that the natural construction of the words of this article, and that construction which they will receive if you attend to the manner in which the word "shares" is used throughout these articles, is in accordance with the judgment of the Court below, I am confirmed, rather than otherwise, in that conclusion by the Act of 1867.

Therefore I move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN:—

I am of the same opinion. I do not think that in dealing with such a subject as this it is quite right to talk of one arrangement being unjust or just; for I think that where a shareholder thoroughly understands the effect of the articles and clauses under which he enters into a partnership to take shares, he cannot say that it is unjust either one way or the other. But I was a good deal struck at the first blush of the matter, when I saw it, by the feeling which Lord Shand very well expresses, that though not unjust it is unequal, as I may call it, to say that a shareholder who has only paid up 5*s.* shall receive as great a dividend as a member who has paid up £1. He is 5*s.* out of pocket, and he keeps the 15*s.* to himself and makes interest upon it, and it does seem unequal that he should be paid as much as the other shareholder. On the other side, it is a very strong proposition to say that he is to be paid no more than his proportion upon what he has paid up. If in the case which I have first supposed there is an inequality, there is a very strong argument for saying that the latter case would be unjust and hard upon him; for, taking a case which is not at all an unlikely one to happen, of a company paying 25 per cent., then at the end of five years, after paying 25 per cent., the man who has paid up £1 has received £1 5*s.*, and therefore has been repaid his whole pound and more, which is a very handsome interest; while the man who has only paid up 5*s.* has only received back one-fourth part of it per centum, that is to say, has only received (I think I am doing the sum rightly) 6*s.* 3*d.* for his 5*s.*—he has made, no doubt, a profit. If there then comes a winding-up, the man who has paid £1 is free, he has made his profit and goes away clear, and the man who has made a profit of 1*s.* 3*d.* upon his 5*s.* is obliged to pay 15*s.*, and does pay it. That case, as I said before, is not at all improbable, and it does seem a little uneven and unequal, and if you like to use the word you may say unjust, that the man who incurs this risk should get nothing whatever to compensate him for it.

But which is the right or the best course is not, I apprehend, a

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matter for your Lordships to consider. What the Court below had to deal with and what we have to deal with is to see what is the true construction of these articles. They happen to be identical, in the manner in which they are framed, with the articles in Table A of the Act of 1862. Upon that question I have not been able to doubt that the Court below was quite right in the judgment which it gave, and that that judgment should be affirmed. The words of Article 71 of these articles (72 in Table A) are, "The directors may, with the sanction of the company, declare a dividend to be paid to the members in proportion to their shares." I can put no meaning whatever upon the words "in proportion to their shares," except that the dividend is to be equal to each member according to the proportion which he has subscribed of the capital money. "Nominal capital" is the phrase used, which is not very applicable when the company is once started; the subscribed capital which the member has paid up, or may be made to pay up, is, I think, the right term. The dividend is to be paid to the members in proportion to their subscribed capital. Mr. Benjamin endeavoured to argue that the directors have the power, under the word "may," to give a dividend in a different proportion. I am quite clear that they have no such power at all. They need not give any dividend if they think it inexpedient to do so, but if they give a dividend they must give it rateably in the way I have mentioned, and in no other way whatever.

Then if the dividend is to be in proportion to the capital which has been subscribed, the thing, I think, is to follow what in my opinion is the plain meaning of the words. It was argued (I confess that I feared that I did not appreciate the argument, for I never could understand how it could be an argument at all) that because there is a clause, clause 7 in Table A and 6 in these articles, which enables a man whose shares are not paid up to agree with the directors to advance the amount uncalled or any part of it to them upon such terms as they may agree upon, that is somehow or other antagonistic to the construction which the Court below has placed upon clause 71. As I said before, I was afraid there might be some argument there which I did not perceive. I can only say that exercising the greatest acuteness

which I could exercise for the purpose, I could not see that there was any argument there at all.

The result comes round to this—if the words mean what I have construed them to mean, is there any reason in holding that we should force them to mean something else? Though there may be inequality, and perhaps more inequality in the one construction than in the other, still I think the question is really which of the two should be adopted. Whether, if the parties are ingenious enough to strike it out, we should adopt some tertium quid, something between the two, which should give to a shareholder who has not paid up the full amount of his shares some benefit without giving him quite the same amount of dividend as if he had paid the money all up. Whether any such thing could be devised or not, or whether it would be consistent with the Acts as they stand, is not the question now before us, and I will not express any opinion upon it.

Now, when one looks at the Act of 1867 it very greatly strengthens my belief that the true construction of these words is not that for which the appellants contend. I do not read that Act exactly as saying that the Act of 1862 did prohibit the third thing in that clause (1), it rather seems to be this, that the Act of 1862, if it had the effect of preventing it is not in future to prevent it—it declares that it shall not prevent it in future, if on the true construction of the regulations as they stand originally, or of the regulations as altered, it may be done. Now, it is not pretended here that the regulations have been altered so that it may be done. It therefore comes solely to the question, on the true construction of the regulations as they were originally drawn, is this prevented or not? I have already expressed my opinion that upon the true construction of the words, taking them in their ordinary sense, it is prevented; and holding that opinion I think that the judgment of the Court below should be affirmed.

LORD WATSON:—

My Lords, in forming an opinion upon this case, I have left out of consideration the comparative injustice or inconvenience of

(1) Sect. 24 of *Companies Amendment Act*, 1867.

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adopting one or other of the modes of paying dividend for which the parties respectively contend. It appears to me that the legislature has left these matters for each company to determine in framing their memorandum and articles of association, or by subsequently modifying these articles, if they have left room for themselves to do so. I am of opinion with your Lordships, that the question here turns upon the meaning of the word "shares" as occurring in the 71st of the articles of association of this company, and I have come to the same conclusion as your Lordships, to the effect that the word "shares" in that article is used to signify the amount of subscribed capital which the member has either contributed already or has undertaken to contribute, and that it bears no reference whatever to the different amounts which may have been paid up, under call, upon different classes of shares. Your Lordship on the woolsack has already stated, much better than I could have done, all the reasons which have led me to that conclusion.

LORD BRAMWELL :—

I am entirely of the same opinion. I think that the inequality which has been referred to ought to be examined into no further than for the purpose of shewing that it is not unreasonable to interpret these articles of association in the way that we are doing. It seems to me that the more reasonable thing to have done, if it had occurred to the parties, would have been to have provided either that the full dividend should not be paid on the shares not fully paid up, or (which perhaps would have been the still more reasonable thing) that interest should be paid by the shareholder upon the unpaid part of his shares. But it does seem to me that it would be an unreasonable thing (though I dare say shares will be issued again upon similar terms and taken without any anticipation on the part of the public of the result) to do with the consequence Mr. Buckley was compelled to confess would follow, namely, to hold that, although there might be a shareholder who had paid nothing at all, and who never would receive any dividend, and would never participate, in one way or the other, in the affairs of the company until he was called upon to pay their debts, yet he should be subject to the liability to do so. At all

events, this might very well happen, he might pay, instead of 5*s.* upon each of those shares, only 5 per cent. upon it, and then it would be a most unreasonable thing to hold that having no power to receive more than the dividend upon that amount, and having only contributed one twentieth part of the share, he should, nevertheless, be liable for the whole amount of it. I think, therefore, it is right to look at the alleged hardship or inequality with a view to shewing that there is nothing unreasonable in the construction which has been put upon this clause.

And now we come to the clause itself. It is a little remarkable, it says, "The directors may declare a dividend," that is to say a sum to be divided—you may put a stop there—"to be paid to the members in proportion to their shares." Now Mr. Buckley has shewn (not that I think there is any great doubt about it) that the word "shares" there does not mean the share named in the Act of Parliament, which is numbered and otherwise particularly described. But when he came to shew what it did mean the task was more difficult, that is to say, with reference to the interests of his clients, and he, I think inadvertently, dropped the word "interest," that the dividend, the thing to be divided, was to be paid to the shareholders in proportion to their interest, and then, having said that, he endeavoured to make out that "interest" must mean the sum that they had paid, and were liable to pay in respect of calls made. Now that really is to add altogether to the words in the 71st article, and without, as it appears to me, any good reason. Because the only reason at all given was this, that if the construction contended for by the respondent is right, then the directors could not avail themselves of sect. 6 without giving the shareholder from whom they borrowed money, a sort of premium or benefit, and making him better off than any of the other shareholders. All I can say is that if that is so, they must not avail themselves of that section, and instead of borrowing money from their shareholders generally, they must only borrow, if from any, from those who have paid up in full. I see no reason for putting a non-natural meaning upon this very intelligible article 71.

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LORD FITZGERALD :—

My Lords, I too concur in the decision which has been announced, though I confess that I at first entertained rather the contrary impression by reason of the inequality which the respondent's contention would occasion in this distribution of the profits of the company; but having heard the argument, and after more carefully looking at the case, I have come to the conclusion that the decision of the Court below is right. It is agreed upon all sides that the whole question depends upon what is the interpretation to be put upon the word "share" in article 71; and I may add further, in accordance with what has been already said, that it appears to me that "share" and "shareholder" must receive the same interpretation wherever you find them in these articles of association. We find in article 41 that a shareholder is entitled to a vote for every share held by him; and it is admitted that the proper interpretation of that "share" is that it means his proportion of the subscribed capital of the company, which appears in his name on the register of shareholders, and has no relation whatever to what may or may not have been paid up in respect of it.

Again, when we turn to the qualification of directors, the qualification of a director is 1000 shares in the company. I have only to look at the language with reference to a qualification of that kind, and I cannot fail to see that 1000 of the 5*s*. shares would equally qualify a director as 1000 £1 paid-up shares. Then again as to the property of a shareholder in a certificated share, that is a proportion of the subscribed capital of the company registered in the shareholders' list of the company in the name of the individual. There are half a dozen other instances in which the term is used. I see no reason for putting a different construction upon it in clause 71 of the articles. In truth the respondent here insists upon the literal and grammatical interpretation of clause 71—he does not ask to interpolate anything—he takes it as it is and asks for its interpretation. On the other hand, upon the part of the appellants it is necessary, in order to arrive at a conclusion favourable to them, to interpolate some words and place them in article 71; and they ask us to read it

"share in the paid-up capital of the company." I have come to the conclusion that we cannot do that, and that rules the entire question in favour of the respondent.

I may observe also that when this company found it necessary to raise additional capital they did two things: First, they broke up the original £50 shares into £1 shares. Then they passed a resolution of this kind, using the word "shares" in the manner I have just pointed out: "That the directors be empowered to increase the capital of the company," how? "By the issue of 20,000 shares of £1 each." And what was really done was this—the company did not want the £20,000—they did want £5000 of new capital, and they obtained it by issuing these shares upon a deposit of 5*s.* a share, keeping the remaining £15,000 as a reserve to fall back upon; and it is in respect of that £15,000 that the appellants say that the parties holding these shares are entitled to no dividend whatever. But if they had intended that, they had ample power under the 24th section of the Act of 1867 by resolution so to declare. They have not so declared, and in my judgment we ought to affirm the decision of the Court below.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 12th December, 1882.

Agents for appellants: *Wild, Browne, & Wild.*
Agents for respondent: *Connell, Hope, & Spens.*

[PRIVY COUNCIL.]

J. C.* ARTHUR RANKIN BLACKWOOD . . . DEFENDANT;

1882

AND

Nov. 21, 22. HER MAJESTY THE QUEEN . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Lex Domicilii—Lex Loci as applied to the Personal Assets of a Testator—Victorian Act No. 388 *of* 1870, *s.* 2, *sub-s.* 7—*Probate Duty.*

Although the law of a testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are, for the purpose of legal representation, of collection and of administration, as distinguished from distribution among the successors, governed by the law of their own locality and not by that of the testator's domicile.

Held, that, according to the true construction and intention of Victorian Act No. 388 of 1870, "The Duties on the Estates of Deceased Persons Statute, 1870," a legal personal representative in Victoria should, as regards the "personal estate" of the deceased mentioned in s. 2, sub-s. 7, state accounts only of so much thereof as comes under his control by virtue of his Victorian probate.

APPEAL from a judgment of the Supreme Court (September 28, 1881) in favour of the plaintiff.

The question decided in this appeal is whether personal estate belonging to a person who died domiciled in the Colony of Victoria, which is locally situated outside the Colony of Victoria, is liable to duty under the "Duties on the Estates of Deceased Persons Statute, 1870" (Act No. 388).

The facts were stated by consent in a special case, and sufficiently appear in the judgment of their Lordships.

The Supreme Court (Stawell, C.J., Higinbotham, and Williams, JJ.) decided that personal property in the nature of movable property outside the Colony of Victoria belonging to a testator domiciled in Victoria was liable to the duty imposed by the Act, and the Court referred it to the master to ascertain

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

to which class of personal property, movable or immovable, the various properties in the schedule to the special case respectively belonged.

The material portion of the judgment of the Chief Justice was as follows:—

"The question depends apparently on the proper interpretation to be placed on sub-s. 2 of s. 7 of the Act. It prescribes that every executor and every administrator with the will annexed, shall file, in the office of the master, particulars of 'the personal estate of or to which the deceased was at the time of his death possessed or entitled,' and of the real estate comprised in the will. Another section provides for payment of duty on the amount comprised in the statement. The Act seems to me to be aptly described by the title as an Act to enforce and collect the duties on the estates of deceased persons. It partakes of the nature of a Succession Duty Act, and in certain aspects of a Probate Act. The question to be determined in this case is what is meant by 'personal estate,' in sub-s. 2 of s. 7; what is 'personal estate' of a deceased person domiciled in Victoria at the time of his death.

"Primâ facie, the expressions 'personal estate' and 'real estate' refer to estates in Victoria, affect persons resident here, and relate to property within the limits of the country. But by the comity of nations personal estate is governed, not by the place in which the particular property happens to be placed at the time of the death of the testator or intestate, but by the law of the country in which the owner at the time of his death was domiciled. If that were not so, inextricable confusion would necessarily arise. It has been held that the domicile of the deceased owner attracts his personal estate to the place where he was domiciled. The words 'personal estate,' therefore, in the Act must mean personal estate not merely in the country where the deceased owner was domiciled, but also personal estate attracted thither by his domicile at the time of his death. The attraction of personal estate to the place of domicile at the testator's death is a very elementary proposition, the rules upon it are distinctly laid down in Story's Conflict of Laws, s. 380:—

"'It is a clear proposition, not only of the law of England, but

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of every country in the world where the law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to the law which governs the person of the owner, both with respect to the disposition of it and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person. An owner in any country may dispose of his personal property. If he dies it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession.'

"The legal effect of these words has been formulated in the well-known maxim, Mobilia sequuntur personam. So the portion of personal estate of a deceased person that falls within the term 'mobilia,' is governed by the law of the country in which he was domiciled, not by the law of the country where the property may have been at the time of his death. Personal property has no locality; it follows the owner wherever he may be domiciled. This is borne out by the decision in *Attorney-General* v. *Napier* (1), where it was put by Alderson, B., that personal property follows the domicile, and was treated as being in England, although actually it was in India. 'Personal estate' is strictly not the correct expression to use, as there may be personal property, which is not 'mobilia.' See *Attorney-General* v. *Campbell* (2), per Lord Westbury. In *Freke* v. *Carbery* (3), Lord Selborne, in his judgment, referred to the above passage from Story, and said: 'The passage which Mr. Fry has quoted from Story, in which the words of Lord Loughborough were cited with approbation, is simply a translation into English of the maxim, Mobilia sequuntur personam.' That judgment is of some importance in the present case, because the language used in the Act is 'personal estate,' and that expression includes mobilia in other countries, attracted by the law of domicile of the person to whom the mobilia belonged at the time of his death.'

"The law which governs this subject is not only the common law of England, but the law of nations, adopted both by England and by other nations, the question, therefore, being whether the

(1) 6 Ex. 222; 20 L. J. (Ex.) 173.
(2) Law Rep. 5 H. L. 529; 41 L. J. (Ch.) 613.
(3) Law Rep. 16 Eq. 466.

Court, in interpreting the words 'personal estate,' in the present case, is to follow the example set by Courts in England, and in other English-speaking communities, or to form the singular exception in holding that 'personal estate' should be confined, as 'real estate' is confined, to property in Victoria, the principle of attraction by domicile not being applied in this as it is in other countries. The Court is bound to suppose that Parliament, when it passed the Act, was aware of the judicial interpretation which words thus used would receive. I think that the words 'personal estate' should receive the same meaning and interpretation as they do in the Courts at home, and that they include mobilia attracted to the domicile of the testator."

The case was first argued on the 27th and 28th of June, 1882, and now came on to be re-argued before a committee differently constituted. The same counsel appeared as before.

Davey, Q.C., and *J. D. Wood* (*Macnaghten*, Q.C., with them), for the appellant, contended that the judgment of the Court below was wrong, and that Act No. 388 does not extend to personal estate of a deceased which is not locally situate within the colony. When the Act speaks of property it speaks of that property only in respect of which probate or letters of administration have been granted. The Court below has proceeded upon an entire misapprehension of the maxim "Mobilia sequuntur personam." No doubt for all purposes of succession one must look to the domicile of the testator, and not to the locality of the property. But it is otherwise with regard to the exercise of jurisdiction over the property, whether for the purposes of collection, or of administration, or of taxation in the shape of probate duty. The grant of probate itself affords an illustration that personalty for certain purposes has a locality. A Scotch executor acquires no title to property in England by taking out probate or that which is equivalent to probate. In former times there were continual disputes as to whether the will had been proved in the proper jurisdiction. If there was property in two provinces, two prerogative probates had to be obtained. Then how is a Victorian executor in all cases to file a statement of property which is not in the colony?—he may have no knowledge of or control over

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it. So also with respect to his statement of debts due by the deceased, they must be primarily those due by him to persons within the colony. The personalty locally situate within a country is primarily applicable to the payment of debts due to persons in that country. In France they do not admit foreign creditors to share in the assets there. The executor must give a list of creditors within the jurisdiction, and then, under sect. 14 of the Act, if English creditors come in the executor is to claim a return of duty. There is frequent use of the general expressions "personal estate" and "real estate" in this Act, No. 388, without qualifying words. But the literal meaning in other instances as well as in this cannot be accepted without qualification, derived either from locality or the character in which the person to whom the property comes has to deal with it. It frequently happens that a man dies intestate as to one estate and testate as to another. The "duty" can only be on the real estate of which administration is granted; otherwise duty would be paid twice over on real estate. Probate was not at the time of passing No. 388 granted of real estate. Reference was then made to sect. 4 of Act No. 230. Then as to sect. 7, sub-sect. 4, what is the heir-at-law to file a statement of? Of the lands which have descended to him ab intestato, not of the lands which have been devised away from him. As to sub-sect. 5 reference was made by way of illustration to the case of a feme covert having power of disposition by will over lands. As to sect. 8, is the heir-at-law to file a statement of land which did not descend to him? Is the administrator of freehold lands to pay duty on land of which administration is not granted to him? In sect. 9, how can the Court in Victoria order a sale of property in England? see *Preston* v. *Melville* (1), where it was held that the English administrator is the person to administer. In sect. 10 a debt is to be paid "out of the personal estate," that must be personal estate of which probate or administration has been granted in Victoria. By the rules, too, the statements are to be filed within two months. If the respondent is right probate duty would be paid twice over on English assets—once in Victoria, and again in England under 21 & 22 Vict. c. 56. As to Act No. 388, sect. 7, sub-sect. 2: "the debts due by the

(1) 8 Cl. & F. 1.

deceased" mean to persons resident in the colony: see *Cook* v. *Gregson* (1). Reference was also made to *In re Bagot's Will* (2).

By sect. 2 of Act No. 388, the Curator is exempt from the payment of duties under the Act. Act No. 427, s. 23, directs that he only pays on the balance of the estate in his hands. Reference was made to 21 Hen. 8, c. 5, s. 3 (see Williams on Executors, vol. ii. p. 973, 7th ed.), requiring an inventory of "all the goods that were of the deceased": *Raymond* v. *Van Watteville* (3), and other cases cited in Williams shew that though the words of the Act of Hen. 8 are general, the required inventory is confined to the personal estate of which probate or administration is sought. Reference was also made to 55 Geo. 3, c. 184. Every Act must be construed secundum subjectam materiem.

Kekewich, Q.C., and *H. E. Gurner* (*Benjamin*, Q.C., with them), for the respondent, contended that all the moveable property of the testator was liable to duty under Act No. 388, notwithstanding that portion of it was situate out of the colony. Reference was made to Act No. 388, sect. 2, Act No. 230, and Act No. 427, s. 23. When the Legislature thought fit to limit the duties of the curator to property in Victoria it used express words. Act No. 230, ss. 11 and 12, speak of the "personal estate within Victoria." In sect. 13 there is no restriction on the estate which he is to administer. In the one case it was intended that the curator should deal only with the estate within the jurisdiction, in the other, wherever it was. The curator (Act No. 427, sects. 13 to 23) perhaps need not file a statement, but he must arrive at the amount of the duty according to the mode which the Act has pointed out. The curator is to pay duty in the same way that any other executor or administrator would have done, But the curator would not have to pay duty on assets beyond the colony, unless he is nominated by the testator. Again, the debts due by the deceased mean the debts due everywhere. There is no hardship in making the Victorian executor include in his statement assets and liabilities everywhere, because he is entitled to get probate in every country. No doubt there is a hardship and difficulty

(1) 2 Drew. 286. (2) 7 Vict. L. R. I. P. & M. 106.
(3) 2 Cas. t. Lee, 551.

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where there are separate executors for Victoria and England, for that is a casus omissus in the Act.

As regards Act No. 388 the words "personal estate" and "real estate" are to be construed according to their plain ordinary meaning. The only qualification required is that foreign personal estate is only to be charged with this duty if it is also movable estate. As regards sect. 7, sub-sect. 2, the testator may appoint his executor for assets everywhere, and the executor will have all his property. The validity of the will and the issue of probate are governed by the law of the domicile. Ancillary probate may have to be obtained elsewhere, but that would follow as a matter of course, and the same executor would have control over the whole estate. He could thus obtain a statement of all the property by degrees, and it would be no hardship upon him that he should have to prepare and file one. There is no ground in reason or convenience for cutting down the generality of "personal estate" in construing this Act. The whole estate is to be taxed over which the executor gets control, not merely that which he is enabled by the Victorian probate directly to administer.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

In this case an action was brought by Her Majesty the Queen in the Supreme Court of Victoria against the appellant as executor of James Blackwood, for the recovery of £5000 for duty claimed under the "Duties on the estates of Deceased Persons Statute, 1870." It appears that James Blackwood died domiciled in Victoria, and that, besides his property in Victoria, he was the owner of certain property both real and personal in New South Wales and New Zealand. The Crown claimed duty on so much of the foreign assets as consisted of personal estate, and the appellant resisted the claim. By consent a special case was stated, setting forth in a schedule the foreign assets on which duty was claimed, and concluding as follows :—

"5. The question for the opinion of the Court is :—

"Whether the personal estate in the said schedule or any part

thereof belonging to the deceased and locally situated outside the Colony of Victoria, is liable to duty under 'The Duties on the Estates of Deceased Persons Statute, 1870.'

"6. If the Court shall be of opinion in the affirmative, then judgment shall be entered up for Her Majesty for an amount to be ascertained by the Court, or in such manner as the Court may direct, with the costs of suit.

"7. If the Court shall be of opinion in the negative, then judgment of nol. pros. with costs of defence shall be entered up for the defendant.

"The Schedule of Personal Property above referred to.

"1. A share in station property in New South Wales, held under occupation from the Crown, with improvements, stock, &c., thereon.

"2. Capital in the mercantile business of Dalgety, Blackwood, & Co. in New South Wales, and accumulated profits in that business to date of death, payable in that Colony.

"3. A share in station property in New Zealand with stock improvements, &c., thereon."

The Court directed judgment to be entered for the Crown for the amount found to be due on so much of the scheduled property as was of a movable nature so as to fall within the maxim "Mobilia sequuntur personam." They held that the nature of the property should be ascertained by inquiry with reference to the laws of New South Wales and New Zealand. The correctness of that decision is challenged by the present appeal. No copy of any order is set out in the record, as ought to have been done, and their Lordships take the decision to be as described in the judgment of the Chief Justice.

The statute under discussion was passed in the year 1870, and is numbered 388. Its general scheme is to make the representatives of a deceased person, as regards both real and personal estate, liable to pay the duty mentioned in the schedule (sect. 8), which duty is (sect. 10) to be deemed a debt due from the deceased to the Crown. For this purpose (sect. 7), the representatives are to file statements specifying the particulars and value of the personal and real estate and of the debts due by the deceased,

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and shewing the balance remaining after deducting the debts from the value of the estate. The duty payable is (sect. 8) to be calculated upon the final balance appearing by the statements. The time of payment is to be fixed by rules made by the Governor. In the cases of legal personal representatives the Act contemplates (sect. 7) a grant of probate or administration prior to the filing of statements, but provides (sect. 12) that the actual probate or letters of administration shall not issue until the duty has been paid, nor be receivable in evidence unless indorsed with a certificate by the proper officer certifying the fact of payment and its amount. The same principle applies to administrations of freehold lands and rules to administer. In the case of heirs-at-law (sect. 7, sub-sect. 4), if the heir does not file his statement in proper time, the Master in Equity may assess the duty. When the legal personal representative comes to distribute the property, he is (sect. 11), unless a testator has made a different disposition, to deduct from every devise, bequest, and legacy an amount equal to the duty upon such devise, bequest, or legacy, calculated at the same rate as is payable on the estate. The schedule imposes duty upon the estate in bulk at a percentage rate, increasing from 1 to 5 per cent., as the value of the estate increases, but (sect. 24) a more favourable rate is allowed to the widow and children of the deceased.

There has been a great deal of discussion, both in the Court below and at the Bar here, on the question whether the duty imposed by this statute is to be considered a probate duty or a legacy duty. If those terms are used merely as short descriptions familiar to English lawyers of two classes of statutes, the principle of one being to tax the property to which probate gives title and to levy that tax at a time prior to administration, and the principle of the other being to tax the property which actually falls to the successors of the deceased and to levy the tax at the time when the enjoyment accrues, they may be conveniently used for the purposes of the argument. If used for any more exact application, they are misleading. The statute under discussion does not make any such distinction as the English law has made between probate and legacy duties. It imposes a single duty on the property of deceased persons. That

duty resembles our probate duty in being made a condition of the issue of the probate, and in being taken from the estate while it is yet in bulk and before the process of administration begins. In other respects, notably by reason of its incidence on real estate, and of its being chargeable against every legatee, and of the difference in its rate according to the relation of the successor to the deceased, it more resembles our legacy or succession duties. The one term or the other will seem more appropriate to the statute according to the point from which it is approached or the operation it is called on to perform.

This discussion therefore is not very profitable. The essential question is whether the Victorian Legislature intended that a legal personal representative in Victoria should state accounts of all personal or all moveable estate belonging to the deceased wherever actually situate, or only accounts of so much as comes under his control by virtue of his probate. That question must be decided by a careful examination of the statute itself.

There are decisions on the construction of English statutes with reference to English methods of taxation which would be of great value if it were first found that the Victorian Legislature had adopted any such method, but which are of little value until that conclusion has been reached. It appears to their Lordships that the Court below has first searched for a rule of law, and has then bent the statute in accordance with it; whereas, until the true scope and intention of the statute has been discovered, it cannot be seen what rules of law are applicable to it.

The words of the statute which directly affect the Appellant are to be found in sect. 7, sub-sect. 2, and run as follows:—

"Every executor and every administrator with the will annexed shall within the prescribed time from the grant of probate or letters of administration to him, or such further time as the master may allow, file in the office of the master a statement specifying the particulars of the personal estate of or to which the deceased was at his death possessed or entitled, and of the real estate comprised in such will, and the value thereof, and of the debts due by the deceased, distinguishing between secured and unsecured debts, and stating the nature of the security held for the same and the estimated value of such security, and showing

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the balance remaining after deducting the amount of the debts from the value of the estate of the testator."

The Chief Justice says, "Primâ facie, the expressions 'personal estate' and 'real estate' refer to estates in Victoria, affect persons resident there, and relate to property within the limits of the country." Mr. Justice Higinbotham says, "In the absence of words indicating a clear intention to extend the duty beyond Victoria, the duty must be held to be limited to real and personal estates within the limits of the colony." But then he adds, "As there are no words of limitation, I think that the Legislature must be deemed to have intended that the duty shall be paid upon all real and personal estates whatsoever which are in contemplation of law situate in Victoria." Thus, he appears to treat the absence of qualifying words as indicating a clear intention to extend the duty beyond the primâ facie meaning of the words which impose it. Then it is said that personal estate is governed by the law of the country in which the owner at the time of his death was domiciled. The result of the two latter propositions is that the duty is to be paid on all personal estate, wherever situated, which belonged to the testator in this case. But the Court qualify that result by confining the duty on foreign personal estate to such part of it as is of a moveable character. The counsel of the Respondent followed the same line of argument at this bar, excepting that they do not admit that the primâ facie construction of the statute is against them.

It does not appear to their Lordships that the doctrines relied on are by any means conclusive of the present question. In the first place, the statement that personal estate is governed by the law of its owner's domicile must be taken with material qualifications. To say nothing of other limitations, it is limited just at the point which is material for the present purpose. The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives; as, for instance, when a creditor gets letters of

administration in the Court of the domicile. And when the legal personal representative has been constituted in the foreign country, whether he be the executor of the domicile or another, the administration of assets must take place in the foreign country, with the effect of giving the foreign creditors priority as regards the foreign assets; as is shewn by the cases of *Preston* v. *Melville* (1); *Cook* v. *Gregson* (2). For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile, but by the law of their own locality.

It is true that under the English Legacy Duty Acts, which impose a tax on the succession at the time when the enjoyment of it takes place, it has been held that the intention of the Legislature was to tax all the property of a domiciled English testator, the enjoyment of which is carried and regulated by his will. That is settled by the cases of *Re Ewin* (3), *Attorney-General* v. *Napier* (4), and other well-known cases. But it is not easy to see why it should be thence inferred that the Victorian Legislature, when imposing a tax on the property while yet in bulk and waiting for administration, and as a condition precedent to the issue or validity of the instrument which is the foundation of the right to administer, intended to tax the same class of property.

The Supreme Court, as above stated, thinks that, primâ facie, the words "personal estate" relate to property within the limits of the colony. In their strict and literal meaning the words clearly include all personal estate, wherever it may be. By their primâ facie meaning the learned judges perhaps intend to indicate the meaning they are calculated to bear when the subject-matter of the statute is ascertained, and before legal rules and maxims are applied to it. But then they ought to have decided that the duty attaches only on the property so indicated. For their Lordships find no reason assigned for enlarging the meaning of the words so interpreted, except the application of the maxim "Mobilia sequuntur personam." And the foregoing considerations

(1) 8 Cl. & F. 1.
(2) 2 Drew. 286.
(3) 1 Cr. & J. 151.
(4) 6 Ex. 221.

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appear to them to preclude the application of that maxim to a duty like the present, unless it is made apparent by the Act itself that the Legislature intended it to apply.

Before entering into verbal criticism of the statute, it is to be remarked that no one contends for any construction of it without substantial modification of its literal meaning. According to that meaning the duty would be levied in respect of all the property of every deceased person. But the Supreme Court think that the necessary correlative of holding that the foreign assets of a domiciled Victorian must be taken into account is that the Victorian assets of one who, though resident in Victoria, had a foreign domicile, escape taxation altogether. It appears that they have so decided in the case of *Bagot's Estate* (1). That question is not before their Lordships, and they express no opinion upon it.

Their Lordships conceive that one of the safest guides to the construction of sweeping general words, which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification. But that is exactly what we do find in the statute under discussion. Sub-sect. 2 of sect. 7 which has been quoted above must be read with the other sub-sections, and in them we find repeated use of the expressions of "personal estate" and "real estate," without qualifying words, while it is impossible to read them as unqualified.

In sub-sect. 3 of sect. 7 it is enacted that every administrator of freehold lands shall file a statement specifying the situation and extent of the freehold lands of or to which the deceased died seised or entitled. Now this general expression is clearly to be modified by confining it not only to lands in Victoria but to lands comprised in the grant of administration. For if a man dies testate as to a portion of his land, it is (by sub-sect. 2) the duty of the legal personal representative to file a statement as to

(1) 7 Vict. L. R. I. P. & M. 106.

the real estate comprised in the will. If both these enactments are to receive a literal construction two statements would be required of, and double duty would be assessed on, the same property; and the administrator would be required to pay in respect of land which does not pass to him.

Precisely the same remark is to be made of sub-sect. 4. There the heir-at-law of an intestate is directed to file a statement of the freehold lands of or to which the deceased died seised or entitled. But the meaning can only be that he shall state the freehold lands in Victoria which he takes as heir-at-law.

Again, by sub-sect. 1 every administrator is directed to state the particulars of which the personal estate of the deceased consisted at his death, and the debts due by the deceased. An administrator is defined to be one to whom administration of the goods, chattels, rights, and credits of any person deceased intestate is granted by the Supreme or any other Court. This definition must necessarily refer to personal estate situate in Victoria. It is hard to suppose that the Legislature has required a statement of any other personal estate than that which it specified as passing to the administrator especially as an administrator does not necessarily hold the same position as an executor in a foreign Court of Probate. And their intention not to require any statement out of the strict line of the administrator's business is shewn by the direction that he is not to state debts fully secured by mortgage of real estate; evidently because it is considered that he will probably have nothing to do with those debts.

In these three cases therefore words requiring persons to make statements of all real or all personal estate have clearly to be modified by confining them to statements of property coming to the person in the character in which he is required to make the statement.

Coming to sub-sect. 2, the one under which the present claim for duty is made, we find that the same statement which is to specify the personal estate of the deceased is also to specify the real estate comprised in his will. A will may comprise foreign estate. It is said that the expression "real estate" carries its own limitation with it, because it is something inconceivable—almost a violation of the law of nations—that a State should tax

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its subjects on the basis of their foreign real estate. But in fact personalty in England is as far beyond the direct power of the Victorian Legislature as realty in England. Suppose that a testator domiciled in Victoria has property of both kinds in England, that he gives his English realty and his Victorian personalty to a domiciled Victorian, and that for his English personalty he appoints an English executor, and gives it to a domiciled Englishman. In such a case the Victorian Government has no point of contact with the English personalty; but as regards the English realty the owner of it is the subject of that Government, and so much the richer and more able to pay taxes by reason of his ownership. There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each State levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property. Agreeing that the statement required by sub-sect. 2 is not meant to include foreign real estate, their Lordships consider that construction to be a distinct modification of the literal sense of the words there used.

It is observable that the person who is directed to state the particulars of the real estate is the executor, who did not at the time nor until the passing of Act No. 427 two years afterwards, take the real estate by force of the probate. This circumstance, and this alone, makes it impossible to say that the statements required by sect. 7 are in every case to be limited to the property which the person making the statement takes in that character in which he is required to make it. It is possible that this may have been an oversight, as other passages in the Act, corrected by Act No. 427, are alleged to have been; but their Lordships must read Act No. 388 as it stands.

We find, then, that the framers of this Act have required four descriptions of persons to state particulars of property in general terms which clearly require limitation; that in three cases the statement is to be confined to the property which the person making it takes in the character in which he is required to make

the statement; and that in the fourth case the statement is to be confined to property situate in Victoria. That supplies, as it were, a key to the meaning of such general terms in this statute, and a strong reason for subjecting them to a like modification in the one other passage in which they occur.

Further passages of the Act were brought in aid of this construction, because they contain expressions which, literally construed, would embrace all the deceased's property; whereas, so it was argued, they must necessarily be confined to his Victorian property. But their Lordships do not now enter into those discussions, because the point to be decided is what statements are required by sect. 7, and they think that the meaning of that section is quite clear by itself.

Other arguments were pressed at the bar, founded on considerations external to the Act. The Acts relating to curators were referred to as proving that in the view of the Legislature the property for which a curator has to account, which is clearly confined to Victoria, and the property for which an executor has to account, are co-extensive. And the difficulties thrown in the way of Victorian administration by previously requiring an account of foreign assets were dwelt on, to shew the improbability that the Legislature could intend such an arrangement. Their Lordships think there is force in both these lines of argument, but they do not refer to them in detail, because they find more satisfactory ground for their decision in the Act itself.

What their Lordships find is that the Victorian Legislature have imposed a tax payable by an executor, as a condition precedent to the issue and efficacy of the probate necessary for his action, out of the estate while it is in bulk, and before distribution or administration has commenced. All these things, the person to pay, the occasion for payment, the fund for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax. The reasons which led English Courts to confine Probate Duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statutes which imposed it, apply in full force to this case. The circumstance that in the ultimate adjustment of the estate each beneficiary is to contribute to the duty appears to their Lordships

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to have no bearing on the present question. It was not because the duty fell on the residuary legatee instead of the pecuniary or specific legatees, that the English Courts placed a limitation on the general expressions of the Probate Duty Acts. It was because they thought that the Legislature could not intend to levy a tax on the grant of an instrument in respect of property which that instrument did not affect. Their Lordships think that, in imposing a duty of this nature, the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they hold that the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under sect. 7, sub-sect. 2, of the Act, should be confined to that property which the probate enables him to administer.

The result is that the question put by the special case should be answered in the negative, and judgment of nol. pros., with costs of defence, should be entered up for the defendant. The costs of this appeal must follow the result. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant: *Lawrence, Graham, & Long.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

SILLERY . . . . . PLAINTIFF; J. C.*
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AND
HARMANIS AND HOLLOWAY . . . . DEFENDANTS. *Nov.* 24, 28,

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon Ordinance No. 4, 1867, *ss.* 53, 54—*Application to set aside Sale for Irregularity—Rule as to Thirty Days imperative.*

By Ceylon Ordinance No. 4, 1867, sects. 53, 54, any application by a judgment debtor to set aside a sale in execution of immovable property must be made within thirty days, and the absence of the judgment debtor from Ceylon is no excuse for non-compliance with the positive terms of the Ordinance.

APPEAL from a judgment of the Supreme Court (Oct. 21, 1881) affirming a judgment of the District Court of Kandy (Oct. 4, 1879), whereby an action brought by the appellant was dismissed with costs.

The facts appear in the judgment of their Lordships.

The *Solicitor-General* (Sir *F. Herschell*), and *Barnes*, for the appellant.

Rigby, Q.C., and *Maclean*, for the respondent were not called upon.

The judgment of their Lordships was delivered by

SIR R. COUCH:—

The appellant in this case was, in 1871, the owner of a coffee estate or plantation in the island of Ceylon, called Bathford, which was subject to two mortgages in favour of Charles Cowan for £2000 and Rs.20,000 respectively, with interest at 8 per cent. per annum, and also to a lease for ten years from the 1st of July, 1872, to the Ceylon Company, Limited, at the yearly rent of

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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Rs.2500, in which it was provided that the company should pay the rent to Charles Cowan on behalf of the appellant in part payment of the interest on the mortgages, the interest being Rs.700 per annum in excess of the rent. On the 27th of March, 1871, the appellant being indebted to the respondent Harmanis in the sum of £36 15*s.* 2*d.* for the construction of a wooden store on the estate, the latter brought an action against the appellant in the District Court of Kandy for its recovery. The summons in the action was served on the appellant, who duly entered an appearance on the 4th of April, 1871, and on the 7th of April left the island of Ceylon, and has not since returned to it. The action was proceeded with, and on the 18th of December, 1871, Harmanis obtained a judgment ex parte in it against the appellant for £36 15*s.* 2*d.* and interest and costs. On the 21st of December a writ of execution was issued against the property of the appellant, which, having been twice extended and reissued, was finally extended and reissued on the 30th of October, 1873, returnable on the 3rd of December, 1873.

On or about the 29th of October, 1873, the sale of the Bathford estate, in execution of the decree, was advertised in the Government Gazette to take place on the 24th of November, 1873, the description of the property to be sold being, "All that coffee estate called Bathford estate, containing in extent 212 acres, more or less, together with the buildings and plantations thereon situate," &c. On the 31st of October, 1873, one A. O. Joseph, the proctor for Mr. Cowan and for the Ceylon company, sent to the fiscal of Kandy, the officer charged with the execution, two letters, one giving notice of the mortgages but without stating the rate of interest, and the other stating that the estate was leased for ten years from the 1st of July, 1872, but not mentioning the rent. On the 24th of November, 1873, the estate was put up for sale, when these letters were read and the respondent Harmanis was declared the purchaser at the sum of Rs.16. Of this sum Rs.15. 38*c.* were retained for the expenses of the sale, and the remaining 68*c.* were deposited in the Kandy katcheri. The sale was confirmed by the District Court, and on the 23rd of February, 1874, the fiscal executed a conveyance to Harmanis of all the right, title, and interest of the

appellant in the estate. On the 2nd of March, 1874, Harmanis sold and transferred to the respondent Holloway an undivided half part or share of the estate, subject to the mortgages and lease for Rs.8; and on the 18th of September, 1874, he executed a mortgage of the other half with other property to Holloway to secure Rs.9000 and interest.

On the 4th of August, 1875, the appellant brought an action in the District Court of Kandy against the two respondents, alleging in his libel that the sale in execution was invalid and void by reason of the judgment being a nullity, and also by reason of the sale having been made subject to the mortgages and lease; and prayed that the ex parte judgment should be declared a nullity by reason of gross and material irregularities, and that the sale in execution should be declared null and void, and the appellant be permitted to enter into his defence in the original action. On the 29th of September, 1876, this action was dismissed with costs; and the appellant having appealed to the Supreme Court of Ceylon, the judgment of dismissal was affirmed.

On the 11th of October, 1878, the appellant commenced the action which is the subject of this appeal, alleging that the advertisement in the Government Gazette materially misdescribed the property to be sold, in that the property was described as the Bathford estate, and the fiscal had power to sell only his reversionary interest, and that the misdescription seriously affected his interests, and praying that the sale of the 24th of November, 1873, and the fiscal's conveyance, might be set aside. The defendant denied that the sale was impeachable for irregularity, and pleaded the judgment in the former action as res judicata. As to the value, there was some evidence that the estate, about the time of the execution, was worth £7000. The District Judge held that the plea of res judicata was sustained, and also said that, in his opinion, the plaintiff's right at the date of the sale was of no value; and the action was dismissed with costs. The plaintiff appealed to the Supreme Court of Ceylon, which held that the judgment of the Lower Court on the plea of res judicata was right, and added that, apart from the question of res judicata, they did not see that the plaintiff had shewn any ground on

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which the sale in execution could be set aside; and from this judgment the plaintiff has appealed to Her Majesty in Council.

Their Lordships are of opinion that the 53rd and 54th sections of the Ceylon Ordinance No. 4, 1867, are a conclusive answer to the action. By sect. 53 it is enacted:—"The fiscal or deputy fiscal shall report every sale of immovable property made by him or under his directions within a week after the same shall have been so made, and it shall be open to the debtor, or any other party impeaching such sale on the ground of irregularity or informality, or to the fiscal or deputy fiscal, if any such ground shall be made apparent to him within thirty days of the sale, to state or report to the Court his objections to the sale being confirmed, and the Court having inquired into the same summarily, shall either confirm or disallow the sale as to it shall appear just and reasonable, but no sale shall be disallowed unless a material irregularity in publishing or conducting the sale shall be shewn, and that the applicant has sustained substantial injury by reason of such irregularity. The fiscal, or his deputy, shall either grant the conveyance or withhold the same for a time, or absolutely, according to the directions which the Court shall give him;" and by sect. 54:—"No sale shall be held bad on the ground of irregularity or informality the objections to which shall not be made within thirty days, as prescribed by the preceding section." The irregularity, if any, was only in the description in publishing the sale, and no application was made to set the sale aside. The plaintiff has not shewn that the want of bidders was caused by this irregularity; and if the Lower Courts are right in their opinion as to the value, he has not sustained any injury; but it is not necessary to decide that question. The terms of the Ordinance are positive, and the appellant cannot excuse his non-compliance with it by his absence from Ceylon. He knew of the action, and might have instructed some person to watch the proceedings, and the Chief Justice says in his judgment that it is not the practice of the Ceylon Courts that formal notice shall be given to a defendant of the steps taken to enforce a judgment by execution.

This being their Lordships' view of the case, it is not necessary for them to give any opinion upon the defence of res judicata; but

it is not to be inferred from their not doing so that they concur in the opinion of the Ceylon Courts on that question. They will humbly advise Her Majesty that the judgment of the Supreme Court of Ceylon ought to be affirmed and this appeal dismissed; and the appellant will pay the costs.

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Solicitors for the appellant: *Young, Jones, Roberts, & Hale.*
Solicitors for the respondents: *Johnsons, Upton, Budd, & Atkey.*

[PRIVY COUNCIL.]

PRINCE . . . . . DEFENDANT;

AND

GAGNON . . . . . PLAINTIFF.

J. C.* 1882 *Nov.* 25.

ON APPEAL FROM THE SUPREME COURT OF THE DOMINION OF CANADA.

Practice—Special Leave to appeal.

Their Lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

Petition for special leave to appeal refused, the case depending on a disputed matter of fact whether there had been a gift or sale of certain goods of the value of £1000.

THIS was a petition for special leave to appeal under the circumstances stated in the judgment of their Lordships, from a judgment of the Supreme Court of Canada (June 22, 1882), which reversed a judgment of the Court of Queen's Bench (Sept. 18, 1881), and confirmed a judgment of the Superior Court of Athabaska (April 13, 1881) in favour of the plaintiff.

Bompas, Q.C., for the petitioner.

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The judgment of their Lordships was delivered by

LORD FITZGERALD :—

The petition before us is for liberty to appeal against a judgment of the Supreme Court of the Dominion of Canada.

The suit involved a question as to a sum of about £1000. On one side it was alleged that this sum ought to be taken into account, as it represented goods which were given upon a contract of sale by the father to the son on the occasion of the father relinquishing business in favour of the son at the time of the son's marriage. On the other hand, it was alleged that the transaction in question was not a sale, and that it was a gift from the father to the son executed by delivery of the goods in question to the son. There is no doubt the goods were manually delivered to the son; and if it was intended to be a gift, the fact of that executed delivery, though without any writing, would be quite sufficient to vest the property in the son. That was the only matter in the end in controversy in the suit. On that subject evidence was given on both sides, and the Supreme Court of Athabaska, one of the Courts of the Province of Quebec, having heard the evidence on both sides, after due consideration of the whole of the evidence, came to the conclusion that the transaction amounted to an executed gift, and was not a sale. From that there was an appeal to the Court of Queen's Bench for the Province of Quebec, and that Court deduced a different inference from the facts in proof. They came to the conclusion that the party who alleged the gift had failed to prove it to be a gift, and was to be chargeable with the value of the goods as being goods sold and delivered, either sold and delivered at a stipulated price or upon a quantum meruit. Those two Courts were in conflict, and then came an appeal from the decision of the Court of Queen's Bench to the Supreme Court of the Dominion; and that Supreme Court, with the advantage of the light cast upon the case by the decisions of the Court at Athabaska and the Court of Queen's Bench,—came to the conclusion that the decision of the Court of Queen's Bench was erroneous, and should be reversed; and accordingly they reversed that judgment. Their Lordships, having looked into the case, see that it involves nothing whatever

beyond this £1000. There is no grave question of law or of public interest involved in its decision that carries with it any after-consequences, nor is it clear that beyond the litigants there are any parties interested in it. The question for their Lordships to determine is whether, under such circumstances, they will recommend Her Majesty to grant to the petitioners special leave to appeal.

Before the constitution of the Supreme Court of the Dominion of Canada there was a right to appeal from the Courts then in existence where the value of the matter in controversy was beyond £500, but that does not apply to the Supreme Court. The language of the legislature of the Dominion is: "The judgment of the Supreme Court shall in all cases be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative;" and their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

Their Lordships proceed now to apply the principles laid down by this Board in the case of *Johnston* v. *Minister of St. Andrews* (1), and in the case of *Valin* v. *Langlois* (2), to the present petition; and as they are of opinion that they ought not to advise Her Majesty to exercise her prerogative by admitting an appeal in a case depending on a disputed matter of fact, in which there is no question involved of any magnitude or of any public interest or importance, their Lordships will humbly advise Her Majesty to refuse liberty to appeal in this case.

Solicitors for petitioner: *Freeman & Bothamley.*

(1) 3 App. Cas. 159. (2) 5 App. Cas. 115.

[PRIVY COUNCIL.]

J. C.* 1882 Dec. 5, 6, 7. 1883 Feb. 10.

GERALD STRICKLAND . . . . . DEFENDANT;

AND

THE MARCHESE FELICISSIMO APAP . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF THE ISLAND OF MALTA.

Construction of Deed—Primogenitura.

The general rule governing the succession to a primogenitura is that line is to be considered in the first place, degree in the second, sex in the third, and age in the fourth. A prescribed deviation therefrom must not be construed as interfering therewith more than is necessary to give effect to the deviation.

The deed of foundation of a primogenitura prescribed that sex should be preferred to line and degree, and gave certain powers of nomination. Under clause 3, which directed that in the events which happened the succession should go "ad unum e masculis descendentibus a feminis de eadem linea masculina;" N. succeeded. The clause further provided that in subsequent successions the order of line should be, the direct before the collateral, the nearer collateral before the more remote.

The deed contained also the following clause:—

5. "Quod quilibet possessor pro tempore præsentis primogenituræ, si fuerit masculus, possit nominare et eligere suum immediatum successorem aliquem vel aliquam ex vocatis in præsenti instrumento ad sui libitum, etiam si sit sibi magis remotus vel remota, vel minor natu, dummodo non pervertat ordinem vocationis et prælationis superius præscriptum; et non facta hujusmodi nominatione et electione censeatur semper nominatus magis proximus ultimo possessori pro tempore in gradu naturæ, et in paritate gradus major ætate."

On the death in 1875 of N., without issue, the succession opened.

In a suit by the respondent, the son (born 1834) of N.'s youngest sister claiming as nearest in degree of nature; the appellant, the grandson (born 1861) of an elder sister of N. contended that he was entitled by priority of line:—

Held, that the appellant was entitled.

The devolution of the primogenitura in the absence of nomination must be ascertained by construing clause 5 relatively to the power of nomination given thereby, which merely enables the possessor to regulate the order of

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* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

succession within the prescribed order of lines. Priority of line is always to be regarded, and in the absence of nomination priority in degree, and then in age must also be attended to.

APPEAL from a judgment of the Court of Appeal (Oct. 13, 1879), reversing a judgment of the First Hall of Civil Court (Jan. 28, 1878), which decided against the claims of the respondent and Mrs. Strickland and in favour of the appellant.

This was an action in which the question was as to the right to the succession to an estate in Malta. The estate was erected into a primogenitura by a deed executed by Count Pietro Cajetano Perdicomati Bologna in the year 1739, in pursuance of the will of Canon Mangion, his great-uncle. The estate was consequently called the Mangion Primogenitura, and descended in the family of Perdicomati Bologna until it vested in the late Count Sir Nicola Sceberras Bologna, K.C.M.G., who died in 1875, without having had any issue. Upon his death the succession opened and the primogenitura was claimed on the one hand by the appellant, Gerald Strickland, a grand-nephew of the late Count Sir Nicola, being the grandson of his sister, Maria Teresa, and on the other hand by the respondent, the Marchese Apap, who is a son of a younger sister of the late Count.

The questions argued were whether the primogenitura was regular or irregular, and what was the effect of the various clauses of the deed of foundation. Both parties to the appeal claimed to take under an express limitation in favour of males descending from a female in the male line of the founder, Count Pietro.

For the appellant it was contended that the primogenitura in question was regular, like that in the *Bologna Case* (1), descending lineally, but with a preference of males over females; that the words of the 5th clause of the deed of foundation must be read into the earlier clauses subject to the rules of a regular primogenitura; and therefore that line was to be preferred, and the appellant being in an earlier line was entitled to succeed.

For the respondent it was contended that the limitation under which both parties claimed was controlled by the actual words of the 5th clause, which gave each possessor of the primogenitura a limited right of nominating his successor, and in default of such

(1) 7 App. Cas. 156.

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nomination gave the succession to the person "nearest in degree of nature," regardless of line.

H. Matthews, Q.C., *Benjamin*, Q.C., and *Seward Brice*, for the appellant.

Arthur Charles, Q.C., and *A. J. Mackey*, for the respondent.

1883 *Feb.* 10.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The question to be determined in this appeal arises thus.

Canon Dr. Don Gio. Francesco Maria Mangion made a will on the 10th of June, 1737, the material parts of which are as follows. After constituting Count Pietro Gaetano Perdicomati Bologna his universal heir, the will proceeds:—

"Voluit tamen jussit ordinavit atque mandavit dictus Dominus Testator, prout vult jubet ordinat et mandat, quod prænominatus Dominus Hæres universalis ut supra institutus infra annos duos a die sui obitus in antea computandos teneatur et debeat de omnibus bonis stabilibus hæreditarijs ipsius Domini Testatoris, et in quibus dictus Dominus Petrus Caietanus fuit ut supra institutus hæres universalis, erigere et fundare in valida et subsistenti forma perpetuam primogenituram, sub arcto et perpetuo fideicommisso, favore masculi legitimi et naturalis ex legitimo matrimonio procreati et descendentis ex dicto Domino Petro Caietano, cum prohibitione quod dicto bona stabilia hæreditaria eorumque fructus etiam durante vita possessoris non possint alienari subjugari hypotecari neque in specie neque in genere nec aliter quomodocumque, in quascumque personas quovis sub prætextu transferri ex quacumque causa quantumvis necessaria, excludens expresse idem Dominus Testator a fruitione huiusmodi primogenituræ perpetrantes aliquod delictum, et hoc in odium delicti, ac etiam omnes et singulos religionem ingressuros ibique regularem professionem emissuros, nedum a proprietate dictorum bonorum, verum etiam ab eorum usufructu, dans et concedens dictus Dominus Testator facultatem dicto Domino Hæredi Universali in erectione et fundatione huiusmodi primogenituræ pactum legem et conditionem apponendi, quod sit

in libertate ipsius Domini Petri Cajetani, qui vita sua durante usufructuare debet bona stabilia hæreditaria prædicta pro fruitione bonorum ad primogenituram erigendam spectantium nominare quem voluerit ex proprijs filijs masculis legitimis et naturalibus, etiam postposito primogenito, et talis nominatus haberi debeat pro primogenito quamvis non fuisset major natus taliter ut filius primogenitus, et quilibet alius nullum jus habeat ad primogenituram nisi fuerit ad eam nominatus a dicto Domino Petro Cajetano a cuius libero arbitrio dependere debet nominatio, quam liberam facultatem nominandi unum ex filijs masculis legittimis et naturalibus dictus Dominus Testator dedit et concessit cuicumque possessori bonorum dictæ primogenituræ. Prout quoque idem Dominus Testator facultatem dedit dicto Domino Hæredi Universali legem pactum et conditionem apponendi in erectione huiusmodi primogenituræ, quod si ultimus masculus illius possessor non haberet masculos, tunc bona ad primogenituram spectantia pervenire debeant ad alium masculum ex ipso Domino Hærede Universali descendentem quamvis remotiorem, in exclusionem fœminarum etiam ex ultimo masculo descendentium, vel quod debeant transire ad fœminam donec et quousque ex ea nasceretur masculus; quatenus tamen nullus masculus per directam lineam masculinam descendens ex dicto Domino Hæredi Universali reperiretur, tunc admitti debeat ad primogenituram fœmina ex descendentibus ex dicto Domino Hæredi Universali ex proximiori ultimo masculo possessori primogenituræ, donec et quousque ex ipsa fœmina nasceretur masculus, et ita in perpetuum observari, excludens dictus Dominus Testator a dicta primogenitura omnes qui non sunt legitimi et naturales et ex legitimo matrimonio procreatos. Similiter dictus Dominus Testator amplam et liberam facultatem dedit dicto Domino Hæredi Universali apponendi in erectione dictæ primogenituræ quæcumque alia pacta leges et conditiones sibi benevisa, quæ habeantur ac si ab initio fuissent a dicto Domino Testatore apposita, etiamsi non compaterentur cum superius expressis, dummodo tamen non sint derogatoria perpetuo fideicommisso et primogenituræ et supra ordinatis, ac substitutionibus et vocationibus de quibus infra, et non alias aliter nec alio modo."

If Count Pietro Gaetano fails to found the primogenitura

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"tunc illius filius primogenitus teneatur et debeat eamdem primogenituram erigere infra tempus supra præscriptum, et cum omnibus pactis, legibus, conditionibus, vocationibus, prohibitionibus, facultatibus, et fideicommissis supra expressis, et non alias."

In default of the whole line, male and female, of Count Pietro Gaetano, the property is to go to the Baroness Mompalao "retento tamen semper et religiose observato ordine primogenituræ et fideicommissi ut supra ordinatum."

Canon Mangion died soon after the date of his will, and Pietro Gaetano, on the 3rd of November, 1739, purporting to act in execution of the powers conferred upon him by the will, executed a deed, of which the most material passages are the following:—

"Hinc prædictus Dominus Petrus Caietanus Perdicomati Bologna, filius quondam Domini Martini Antonij, Civis Civitatis Vallettæ, mihi Notario cognitus præsens coram nobis, adimplendo voluntatem prædicti Domini Testatoris, et utendo facultate sibi ab eodem concessa, vigore præsentis instrumenti erexit et erigit constituitque in primogenituram perpetuam et individuam, omnia stabilia hæreditaria dicti Domini Canonici, sub legibus et conditionibus infrascriptis, quæ inviolabiliter observari voluit et vult cunctis futuris temporibus, reservata tamen sibi vita sua naturali durante usufructu eorumdem bonorum, et non aliter.

"Et primo, quod dicta bona in primogenituram erecta sint simplici absoluto et perpetuo fideicommisso subjecta favore totius descendentiæ dicti Domini Petri Cajetani servato ordine infrascripto; ita ut nullo unquam futuro tempore, nec inter vivos, nec per ultimam voluntatem, nec in totum, nec in partem, possint vendi, subjugari, hypotecari, transferri, et alienari in alios, alienationis vocabulo latissime sumpto, quovis titulo et ex quavis causa etiam necessaria et privilegiata, scilicet detractione etiam legittimæ alimentorum dotis et alia qualibet etiam per Rescriptum et dispensationem Principis, ac de ejus plena potestate; neque quoad fructus, et eorum commoditatem etiam in vita possessoris; sed integra et indiminuta semper conserventur; pro decore suæ familiæ ad commodum tamen infra vocatorum, et juxta ordinem primogenituræ inferius designandorum; quod si quis ex posses-

soribus pro tempore dictorum bonorum per se vel per alium directe vel indirecte præmissis vel alicui præmissorum contravenerit, statim, et ipso jure, cadat a commodo dictorum bonorum eorumque fructuum etiam pendentium, illaque devolvantur ad alios vocatos, servato ordine quo infra: licitum tamen erit possessori pro tempore eorumdem bonorum illa permutare cum alijs bonis æquivalentis valoris, sitis tam in hoc dominio quam in alijs ditionibus, quæ bona censeantur hoc casu subrogata et in totum subjecta præsenti dispositioni et non aliter.

"Secundo, quod dicta bona semper et omni futuro tempore in perpetuum detineri et possideri debeant ab uno ex masculis descendentibus per lineam masculinam a dicto Domino Petro Cajetano, incipiendo ab illo quem ipse nominaverit, et continuando de uno in alium sive descendentem sive transversalem possessoris pro tempore usque ad ultimum, ita ut omnes et singuli masculi descendentes per lineam masculinam a dicto Domino Petro Cajetana, habeant jus præcipuum consequendi dicta bona privative quo ad alios, sive masculos ex fœminis, sive fœminas ejusdem lineæ masculinæ, unus tamen post alium, servato hoc ordine, quod masculus descendens actualis possessoris præferatur masculo collaterali, et masculus collateralis lineæ magis proximæ ejusdem possessoris præferatur masculo collaterali aliarum linearum, et non aliter.

"Tertio, quod donec adfuerit aliquis etiam remotissimus ex dictis masculis descendentibus per lineam masculinam a dicto Domino Petro Cajetano, numquam admittantur fœminæ aut masculi descendentes ab eis, etiam si sint descendentes ultimi possessoris, vel de ejus linea magis proxima; non extantibus vero vel quandocumque deficientibus et extinctis omnibus masculis prædictis, dicta bona perveniant et pervenire debeant in perpetuum ad unum ex masculis descendentibus a fœminis de eadem linea masculina, et transeant de uno in alium usque ad ultimum, servato eodem ordine prælationis qui supra; et non extantibus vel quandocumque deficientibus hujusmodi masculis ex fœminis, eadem bona perveniant ad unam ex ipsismet fœminis, et transeant de una in aliam usque ad ultimam fœminam de dicta linea masculina, eodem ordine servato; quæ tamen fœminæ semper censeantur vocatæ in subsidium donec nasciturus masculus, ad

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quem post mortem naturalem fœminæ actualis posseditricis redire debeant dicta bona toties quoties casus dederit, et non aliter.

"Quarto, quod non extantibus vel quandocumque extinctis omnibus masculis descendentibus per lineam masculinam a dicto Domino Petro Cajetano eorumque fœminis et masculis descendentibus ab eis in præcedentibus duobus capitibus respective vocatis, dicta bona semper et in perpetuum perveniant et pervenire debeant ad descendentes per lineam fœmininam a dicto Domino Petro Cajetano, de uno in alium usque ad ultimum tam marem quam fœminam, servatis eodem methodo et eodem ordine præscriptis pro descendentibus per lineam masculinam in dictis duobus capitibus præcedentibus, ita ut primo loco admittantur masculi, et inter istos masculi ex masculis usque ad ultimum etiam remotum et transversalem ultimo possessori præferantur masculis ex fœminis etiam proximioribus, ac secundo loco in defectu omnium masculorum subintrent fœminæ, donec tamen nasceretur masculus qui semper illas excludere debeat salvo usufructu vita durante fœminæ posseditricis, et ulterius inter concurrentes de unaquaque specie respective præferatur descendens ultimi possessoris collaterali et collateralis ejus lineæ magis proximæ collaterali aliarum linearum ut supradictum fuit, et non aliter.

"Quinto, quod quilibet possessor pro tempore præsentis primogenituræ, si fuerit masculus, possit nominare et eligere suum immediatum successorem aliquem vel aliquam ex vocatis in præsenti instrumento ad sui libitum, etiam si sit sibi magis remotus vel remota, vel minor natu, dummodo non pervertat ordinem vocationis et prælationis superius præscriptum; et non facta hujusmodi nominatione et electione censeatur semper nominatus magis proximus ultimo possessori pro tempore in gradu naturæ, et in paritate gradus major ætate, si autem actualis possessor fuerit fœmina hujusmodi nominationem successoris nunquam facere possit, sed magis proximus et major ætate ut supra succedere debeat juxta methodum superius traditum, et non aliter."

Pietro Gaetano proceeded to nominate his son, Count Nicola, who will hereafter be called Nicola the First.

It is convenient here to introduce the pedigree of the family, beginning with Count Pietro Gaetano.

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The actual devolution of the property has been as follows:—

On the death of Count Nicola the First without male issue, the property devolved upon his eldest daughter, Maria Giovanna, (and would seem to have been held under some family arrangement by the Countess Angela (on which subject there is no distinct information)); on her death it devolved on her son Count Nicola Sceberras, hereafter called Nicola the Second. He died in 1875 without issue, and without having made a nomination, leaving sisters (his brothers having predeceased him), and the question to be decided is, whether, under the true construction of the will and the deed of 1739, Geraldo Paolo Strickland born in 1861, the grandson of Maria Theresa, an elder sister, or the Marchese Felicissimo Apap born in 1834, the son of Maria, a younger sister, is entitled to the succession. The Marchese Apap relies on being nearer in degree to Count Nicola, Geraldo Strickland on being in the nearer line.

The course of litigation has been as follows:—

An action was brought by the Marchese Apap in the Court of first instance in the Island of Malta, against Mrs. Strickland, a daughter of Maria Theresa, and the mother of Geraldo, both in her own name and as tutrix and curatrix of her son Geraldo, then a minor. Chevalier Bonici Mompalao, a curator of the minor, was added as a defendant. The Court gave judgment for Mrs. Strickland so far as regarded the claim to the property made by her on behalf of her son, to the exclusion of Mrs. Strickland as claiming in her own right, and of the Marchese Apap.

From this judgment the Marchese Apap appealed, and the Court of Appeal, by a majority of two judges against one, reversed the judgment of the Court of first instance, and gave judgment in his favour.

From this judgment Geraldo Strickland has appealed.

It is, in the first place, to be observed that the deed of 1739, which, in their Lordships' view, did not exceed the powers conferred by Canon Mangion's will, constituted a "primogenitura," and not a "majoratus."

The presumption of law in the construction of settlements of this class favours "primogenitura" as against "majoratus," and

the deed has been treated by all the Judges as establishing a primogenitura.

The primogenitura is undoubtedly in some respects irregular, but it has been observed by this board in the case of the Bologna primogenitura, "By a well-known rule a deviation from the ordinary mode in which a primogenitura descends is not to be construed as interfering with that mode of descent more than is necessary to give effect to that deviation."

The general rule governing the succession to a primogenitura is thus expressed in Rohan's "Dritto Municipale di Malta," B. iv., c. ii., s. 10, "To succeed in primogenitures, in the absence of any particular rule, one must consider, in the first place, the line, in the second place the degree, in the third place the sex, and in the fourth place the age."

The same rule is to be found in many other books of authority.

The present primogenitura differs from a strictly regular primogenitura by preferring sex to line and degree, and by giving powers of nomination. The rule must, therefore, be modified in its application so far as such preference and such powers render necessary, but no farther; the principle still obtains, when it is not at variance with the terms of the instrument, that line is to be preferred to degree and age. The difference of the application of the rule, as far as concerns line and degree, to "primogenituras" and "majoratus" respectively, is thus clearly illustrated by Torre, vol. i., sect. 5, p. 51.

After expressing his opinion that, in a majoratus, the younger son of the last possessor would take in preference to the son of the elder son deceased, because he is nearer in degree, he proceeds to state, as an uncontroverted proposition, that in a primogenitura the nephew, because he is in a better line, would exclude the uncle.

It may be added that this primogenitura has been before the Sacred Roman Rota, of which high tribunal two decisions are before their Lordships, one by Judge Herzan, the other by Judge Origo.

It appears that, on the death of Nicola the First, Vincenza Matilde, his sister, and her son, the Baron Testaferrata Abela, claimed the succession as against Maria Giovanna Nicola's eldest

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daughter, mainly relying on a second nomination which Pietro Gaetano had made (fifteen years after his former nomination of Nicola) of Matilde, in the event of Nicola dying without male issue. Both judges held that the second nomination was invalid, the power of nominating having been exhausted by the first. Both treated the deed of 1739 as establishing a primogenitura, and Judge Origo further stated that, independently of the question of nomination, Maria Giovanna had the better title, because she was in the better line, i.e., the male line of Pietro Gaetano, and the direct line from Nicola, as distinguished from the collateral. He further dwelt upon the lines as pointed out in the settlement, evidently treating them as of great importance. These authorities are all opposed to the contention of the respondent, that, in determining the succession on the death of Nicola the Second, the question of line is not to be considered.

But apart from authority and technical rules of construction, their Lordships are of opinion that the language of the deed, in its ordinary and natural sense, is sufficient of itself to solve the question in the cause.

The second clause, if it had stood alone, would have established an agnatial primogenitura, i.e., of males from males, and the order of descent is thus described,—

"Servato hoc ordine, quod masculus descendens actualis possessoris præferatur masculo collaterali, et masculus collateralis lineæ magis proximæ ejusdem possessoris præferatur masculo collaterali aliarum linearum, et non aliter."

The third clause deals with the very case before us:—

"Non extantibus vero vel quandocumque deficientibus et extinctis omnibus masculis prædictis, dicta bona perveniant et pervenire debeant in perpetuum ad unum ex masculis descendentibus a fœminis de eâdem lineâ masculinâ."

Nicola the Second is the "unus" answering this description, whereupon it is distinctly directed how the property is to descend from him:—"De uno in alium usque ad ultimum servato eodem ordine prælationis qui supra," that is to say that the direct line from him (the last possessor) is to be preferred to the collateral line, and the nearer collateral line to the more remote. The fourth clause, relating to the devolution of the property on females in the

absence of any male (which has not happened), has no bearing on the case, except as it further illustrates in the last paragraph the importance which the settlor attached to line. If the settlement had concluded with clause 3 (or clause 4, which would have made no difference), it seems clear that Strickland being in the nearer collateral line would have succeeded in preference to Apap in the more remote. There can be no question that each of the sisters of Nicola was capable of originating a line.

The question in the cause is then reduced to the effect of Clause 5.

If the words in this clause, which the Respondent relies upon, are taken without the context, and the clause be read thus,—"Quod quilibet possessor pro tempore præsentis primogenituræ, si fuerit masculus, possit nominare, et eligere suum immediatum successorem aliquem vel aliquam, . . . ad sui libitum, etiam si sit sibi magis remotus vel remota, vel minor natu, . . . et non facta hujusmodi nominatione et electione censeatur semper nominatus magis proximus ultimo possessori pro tempore in gradu naturæ, et in paritate gradus major ætate," there would be no restriction on nomination, and in the absence of nomination (the present case), Mrs. Strickland being equal in degree with the Marchese Apap, and the elder, would take in preference to him.

Such a construction, therefore, would not suit his case, and would, indeed, be manifestly inadmissible. These words must be read with their context, whereupon the power of nomination is limited, firstly, by the words "ex vocatis in præsenti instrumento;" secondly, by the words "dummodo non pervertat ordinem vocationis et prælationis superius prescriptum," words, the signification of which does not seem to have been sufficiently appreciated by the majority of the Court of Appeal. These words necessitate the inquiry, what is the order above prescribed? This is to be found in Clause 3, which adopts the order of line prescribed in Clause 2, i.e., the direct before the collateral line, the nearer collateral line before the more remote.

It follows that Nicola the Second could not have nominated the Marchese Apap in the more remote collateral line in preference to Geraldo Strickland in the nearer collateral line without "perverting the order of vocation and preference above prescribed."

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But if this is the effect of the prohibitory words, what effect is left for the words empowering nomination "ad sui libitum?" The answer to this question is not difficult. The order of lines had been expressly prescribed, but not the order of succession within those lines, which, if not interfered with by the power of nomination, would have been governed by the ordinary rules. The power enables the nominator to disregard these rules as far as degree and age are concerned. Nicola, if he had had sons, could have nominated the younger, in pursuance of the express provision in the Canon's will; he might probably have nominated his grandson in preference to his son, he might have nominated a younger brother of Geraldo.

This construction gives effect both to the power and to the prohibition, and reconciles all the clauses of the deed.

The remainder of the clause relative to the devolution of the primogenitura in the absence of nomination must, in their Lordships' judgment, be construed relatively to the power of nomination. It is almost incredible that the settlor should have restricted the latitude of nomination within certain limits, and should have desired the devolution of the property in the absence of nomination, to go beyond those limits; still less that it should go so far beyond those limits as to destroy the whole character of the primogenitura he was founding, nor is such a construction consistent with the strict language of the clause. In default of actual nomination one is to be deemed nominated: "censeatur nominatus." The natural meaning of that expression is that this imported or supposed nomination is to be of the same nature as the real nomination might have been. The limit of line must be taken to apply to devolution in the absence of nomination, and the effect of the provision on this subject is that whereas the last possessor might, with due regard to the prescribed order of sex or line, give a preference to the more remote in degree, or to the younger in age; in the absence of nomination, the nearest in degree, or if there be equality of degree, the eldest in that degree shall take. Thus the power of nomination and the gifts in default of nomination have precisely the same range of objects. The gifts in default of nomination apply the ordinary rules of primogenituras to the cases not before expressly provided for;

the power of nomination gives to its possessor a free choice in those same cases; but neither the nomination, nor the gifts in default of it, operate to displace the order of vocation or preference expressly prescribed by the previous parts of the deed. This construction is fortified by the provision at the end of the clause, that, on the succession to a woman (who cannot nominate), "magis proximus et major ætate, ut supra, succedere debeat, juxta methodum superius traditum, et non aliter."

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Appeal Court of Malta be reversed, and the judgment of the Court of first instance be affirmed. The Respondent should pay the costs in the Courts of Malta and of this appeal.

Solicitors for Appellant: *Ward, Mills, Witham, & Lambert.*

Solicitors for Respondent: *Gregory, Rowcliffes, Rawle, & Johnstone.*

[PRIVY COUNCIL.]

J. C.* 1883 Feb. 7, 8, 27.

WILLIAM MILES . . . . . PLAINTIFF;

AND

THOMAS McILWRAITH. . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland Constitution Act of 1867, *ss.* 6, 7—*Principal and Agent—Estoppel.*

In an action to recover penalties against the defendant for having contrary to the Queensland Constitution Act of 1867 sat in the Legislative Assembly as a member thereof and voted therein; it appeared that M., M., & Co. had in 1878 "for and on behalf of the owners of the ship *S. H.*" but contrary to the express direction of the Defendant (one of such owners), concluded a charterparty with the local Government; that such charterparty was made in pursuance of an agreement between M., M., & Co. and the Government to supply ships of a particular description to carry emigrants, which agreement did not provide for any privity of contract between the owners of such ships and the Government; that M., M., & Co., were the general agents of the defendant to charter ships in which he held shares, and that one of the firm was registered as managing owner of *S. H.*; and that it was neither alleged nor proved that the Government ever knew that M., M., & Co. or any member of that firm had general authority to bind the defendant, and had acted upon the belief that such general authority continued unrestricted:—

Held, that under such circumstances the Government could not have held the defendant bound to them, and consequently that he was not disqualified under the Act.

Freeman v. *Cooke* (2 Ex. 654) approved.

Quære, whether in the absence of any notice to the Government of such special restriction, the general authority of the agent if known to the Government would have sufficed to bind the defendant so as to disqualify him under the Act.

Quære, also, as to the meaning of "presume to sit and vote" in s. 7 of the Act, and as to what knowledge by a member of his disqualification is implied thereby.

APPEAL from a judgment of the Supreme Court (Sept. 7, 1881) refusing a rule calling upon the respondent to shew cause why a judgment entered for him should not be set aside and instead thereof a judgment entered for the appellant for £1000, upon the

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

ground that upon the findings of the jury the judgment should have been entered for the appellant instead of the respondent, or why there should not be a new trial upon the ground of misdirection.

The question involved in the action and appeal was whether the respondent, who before and at the time of making the charter-party hereinafter mentioned, and dated the 23rd of February, 1880, and at the date of suit, was a member of the Legislative Assembly of Queensland, is liable to the penalty imposed by the Constitution Act of 1867 (31 Vict. No. 38) upon any person who being disqualified by reason of his having entered into a contract or agreement for and on account of the public service shall presume to sit or vote in the Legislative Council or Legislative Assembly.

The facts of the case and the proceedings in the action are sufficiently set forth in the judgment of their Lordships.

The documentary evidence upon which the question whether the respondent had entered into any such contract depended, and which is referred to in the judgment of their Lordships, was, in order of date, as follows:—

(1.) An agreement dated the 28th of February, 1876, and made between the Agent-General of the Colony on behalf of his Government, of the one part, and the members of the firm of McIlwraith, McEacharn & Co., of the other part, whereby the firm agreed for two years from the 1st of March, 1876, to supply ships to carry emigrants on behalf of the Colony.

(2.) A memorandum of agreement dated the 20th of October, 1876, and made between the respondent and the same firm as follows:—

"McIlwraith, McEacharn, & Co., being brokers for all ships of which Thomas McIlwraith is an owner, and also contractors for conveying immigrants for the Queensland Government from British to Queensland ports, it is agreed that any ships owned by T. McIlwraith and chartered by McIlwraith, McEacharn, & Co. for the above contract should be paid for at the average price per ton earned by David Hunter & Co.'s ships in other trades."

(3.) An agreement dated the 24th of December, 1878, and

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made between the said Agent-General and the said firm, whereby the firm agreed for two years from the 1st of December, 1878, to provide in each of such two years five ships for the conveyance of emigrants on behalf of the colony, which ships should be considered to sail in all respects under the terms and conditions contained in the printed form of charterparty annexed to the agreement.

(4.) A charterparty in accordance with such printed form, dated the 23rd of February, 1880, and made between the Agent-General and the said firm "for and on behalf of the owners of the ship *Scottish Hero*," whereby the firm agreed to convey emigrants on behalf of the Colony at certain rates to be paid by the Government of the Colony.

(5.) Another charterparty of the same date, and made between M. D. McEacharn, the registered managing owner of the *Scottish Hero*, and the said firm as charterers, whereby the *Scottish Hero* was chartered to the firm, who agreed to pay for the use and hire thereof £3041 10*s*.

(6.) A copy of the register of the said ship, shewing that the respondent was registered jointly with others as owners of fourteen sixty-fourth shares thereof.

Cohen, Q.C., and *McLeod*, Q.C. (*B. L. Leverson* with them), for the appellant, contended that judgment should have been entered for the appellant. They relied upon the form of the charterparty "for and on behalf of the owners," &c., on the respondent being one of the registered owners, and on the firm being the general agents of the respondent as found by the jury to make charterparties on his behalf. On the construction of the Act if a member holds a contract with the Government directly or indirectly, or incurs obligation to the Government in any way of which he is conscious or wilfully ignorant, and votes, he is liable to the penalty imposed. [LORD BLACKBURN:—Are you not making an assumption? The jury have found that the respondent prohibited the making of this contract on his behalf. Have you shewn that he is nevertheless estopped by act or representation from denying his liability?] Where there is any contractual obligation to the Government the member incurring it is liable. Under this con-

tract by charterparty there might have been circumstances under which the respondent might have derived a benefit, and he must be regarded as a surety for its due performance: *Royse* v. *Birley* (1). The respondent at least had a vital interest in whether his ships were employed or not. *Smith* v. *McGuire* (2) shews that where a person has given general authority to another he is bound by what that other does. Here the respondent shewed that he wanted to avoid liability to a penalty, but not that he wanted to avoid liability or contractual obligation to the Government. He practically authorized the firm to employ the ships in which he was interested in the service of the Government, but to do it in such manner as not to get him into trouble; and that is an authority with an impossible or impracticable limitation. The firm therefore made the charterparty with the Government by virtue of the general authority from the owners which the jury have found that they possessed, and there is no suggestion or plea that the respondent had no beneficial interest therein. It is immaterial whether he had a beneficial interest or not. It may be beneficial or the reverse; and the policy of the Act is to secure the independence of the members. The charterparty for the lump sum to the firm, and the withdrawal of their agency in regard to contracts with the Government, were never brought to the notice of the Government, who were entitled to treat the respondent as liable by reason of the general authority which he had given to the firm. With regard to the meaning of the word "presume" in sect. 7 reference was made to *Reg.* v. *Prince* (3); *Davies* v. *Harvey* (4); and they submitted that on this point there had been misdirection, and that there should be a new trial.

Davey, Q.C., and *J. D. Wood*, for the respondent, contended that the judgment was right. The charterparty of the 23rd of February, 1880, made with the Agent-General, did not bind the respondent, and was not intended and did not purport to do so. The agreement of the 24th of December, 1878, did not provide that the firm should enter into a charterparty at all, and their doing so was unnecessary. "For and on behalf of the owners"

(1) Law Rep. 4 C. P. 296.
(2) 3 H. & N. 554.
(3) Law Rep. 2 C. C. R. 154.
(4) Law Rep. 9 Q. B. 433.

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does not mean that the firm were agents of the owners, binding them; at the most it would only bind such of the owners as authorized the contract on the general doctrine as to the liability of undisclosed principals. The stipulations of the contract were all of them to be performed by the firm. The owner was in the same position as the master and crew, who were coupled with him in the charterparty as purporting to be bound thereby. He in that way was in reality no more bound than they were, who admittedly were not. See *Appleton* v. *Binks* (1); *Norton* v. *Herron* (2); *Tanner* v. *Christian* (3); *Cooke* v. *Wilson* (4); *Sharland* v. *Brandt* (5). So far as the contract may be said to import a guarantee by the respondent, entailing no benefit, it is not within the scope of sect. 7 of the Constitution Act. The finding of the jury shews that under the agreement of the 20th of October, 1876, and all the circumstances of the case, the firm were prohibited from binding the respondent. Consequently there was no relationship of agency existing in the particular transaction relied upon. As to the other alternative, agency by estoppel, the right of the Government to treat the respondent as liable, three things were requisite to create it; knowledge by the Government of the general agency of the firm on behalf of the respondent, reliance by the Government thereon in making their contract, ignorance by the Government of the special restriction which destroyed that agency in the particular case. Only the last of these three requisites existed. There was neither allegation nor proof that the Government knew of the general agency, or cared whether the respondent was an owner or not of any chartered ship. The case made by the appellant was that of actual agency, which had been negatived by the jury. So long as the ships were provided and the firm responsible therefor the Government got all they contracted for; and they did not know or care whether the firm chartered as agents for the owners, or sub-chartered on their own account as respects all or any of the shares of the ships. *Frazer* v. *Cuthbertson* (6) shews that the contract of a registered owner does not necessarily bind the other

(1) 5 East, 148.
(2) Ry. & Mood. 229.
(3) 4 E. & B. 591.
(4) 1 C. B. (N.S.) 153.
(5) Law Rep. 6 Q. B. 720.
(6) 6 Q. B. D. 93.

owners. Then as regards the word "presume" in sect. 7, that implies an intention to do the thing which constitutes the offence. Here the respondent believed that by express prohibition and by express stipulation (i.e. that he should be paid for his shares at a rate independent of any contract with the Government) he was neither directly nor indirectly interested in any contract within the meaning of sect. 6 of the Act.

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Cohen, Q.C., replied, and referred to *Elbinger Actien-Gesellschafft* v. *Claye* (1).

The judgment of their Lordships was delivered by

1883 Feb. 27.

LORD BLACKBURN:—

This is an appeal from an order of the Supreme Court of Queensland, which is in the following words:—

"Upon the motion of Mr. Griffith, Q.C., with whom was Mr. Garrick, Q.C., and Mr. Rutledge, of counsel for the above-named plaintiff, for a rule calling upon the defendant to shew cause why the judgment directed to be entered for him by His Honour Mr. Justice Harding at the trial of this cause at the Civil Sittings of this Court, at Brisbane, on the twenty-fifth day of August last, should not be set aside, and instead thereof a judgment entered for the plaintiff for one thousand pounds, upon the ground that, upon the findings of the jury as entered, the judgment so directed is wrong, and the plaintiff is entitled to judgment for the said sum of one thousand pounds, or why the judgment and the findings of the jury in answer to the questions numbers 7, 8, 15, and 16 should not be set aside and a new trial had between the parties upon the issues raised by these questions, upon the ground following of

"Misdirection in that

"1. The judge directed the jury with respect to 7th and 15th questions that the defendant must be shewn to have had actual knowledge of the charterparty or contract in question at the times when he sat and voted.

"2. The judge ought to have directed the jury with respect

(1) Law Rep. 8 Q. B. 318.

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to 7th and 15th questions that it must be shewn that the defendant at the times when he sat and voted had actual knowledge of the charterparty or contract, or had had his attention called to it in such a manner as to attract the attention of a reasonable man, whereas he did not do so.

"3. The judge directed the jury with regard to the 8th and 16th questions that it must be shewn that the defendant intended knowingly to offend against the provisions of the Constitution Act of 1867, that the word 'presume' in that Act means 'knowing of and intending the consequences,' and that if the defendant was ignorant of the effects of the documents he had given, his ignorance was to be taken into consideration by the jury in determining whether his sitting and voting was accompanied by the intention necessary to constitute an offence against the provisions of the statute.

"4. The judge should have directed the jury that if the defendant, when he sat and voted, knew of the said charterparty, or had means of knowing of it, or had had his attention called to it, and wilfully shut his eyes or voted recklessly or defiantly, he presumed to sit and vote within the meaning of the statute, whereas he did not do so.

"And upon reading the record between the said parties, and this matter coming on by adjournment this day, it is ordered that the said rule be refused."

The terms of the rule are such as not to be intelligible without some previous statement of the nature of the case.

The Queensland Constitution Act of 1867 by s. 6 enacts that—

"Any person who shall, directly or indirectly, himself or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract or agreement for or on account of the public service, shall be incapable of being summoned or elected, or of sitting or voting as a member of the legislative council or legislative assembly during the time he shall execute, hold, or

enjoy any such contract, or any part or share thereof, or any benefit or emolument arising from the same; and if any person, being a member of such council or assembly, shall enter into any such contract or agreement, or, having entered into it, shall continue to hold it, his seat shall be declared by the said legislative council or legislative assembly, as the case may require, to be void, and thereupon the same shall become and be void accordingly. Provided always, that nothing herein contained shall extend to any contract or agreement made, entered into, or accepted by any incorporated company, or any trading company, consisting of more than twenty persons, where such contract or agreement shall be made, entered into, or accepted for the general benefit of such incorporated or trading company."

Then by s. 7 it is enacted that—

"If any person, by this Act disabled or declared to be incapable to sit or vote in the legislative council or legislative assembly, shall, nevertheless, be summoned to the said council, or elected and returned as a member to serve in the said assembly for any electoral district, such summons or election and return shall and may be declared by the said council and assembly, as the case may require, to be void, and thereupon the same shall become and be void to all intents and purposes whatsoever; and if any person, under any of the disqualifications mentioned in the last preceding section, shall, whilst so disqualified, presume to sit or vote as a member of the said council or assembly, such person shall forfeit the sum of five hundred pounds, to be recovered by any person who shall sue for the same in the Supreme Court of Queensland."

The appellant as plaintiff below sued for five penalties of £500 each as being incurred by the respondent, then defendant, under the latter part of this section.

It is clear that the party suing for the penalty must shew that the defendant at the time when he sat or voted was under one of the disqualifications mentioned in the 6th section, it being a question of law depending on the construction of the statute whether the facts proved are such as to amount to a disqualification, and on this being proved the further question will arise

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whether the defendant at the time when he sat or voted presumed to do so, it being a question of law depending on the construction of the statute what constitutes presuming within the meaning of the statute.

It appears from the judge's notes that on the trial of this case the judge summed up at considerable length, and then asked the jury sixteen questions. After they had retired, the counsel for the plaintiff made some objections to part of the judge's direction. The judge, however, refused to alter his direction. The jury returned and gave answers to the sixteen questions. The judge then, in consequence of what had passed, asked a seventeenth question, to which the jury gave an answer. On these seventeen findings he directed judgment to be entered for the defendant.

The rule moved for was in the alternative, that on the findings as entered the plaintiff was entitled to judgment for two penalties, or that if the answers to the seventh, eighth, fifteenth, and sixteenth questions prevented his being so entitled on the ground that it was not found that the defendant, though disqualified when he voted, had such knowledge of his disqualification as to make him when so voting "presume" within the meaning of the statute, there should be a new trial on the ground that there was misdirection as to what would be sufficient proof of presuming. And that there should be a new trial to ascertain whether in fact the defendant had "presumed" to vote.

If the findings had amounted to finding that the defendant was disqualified when he voted, it would have been necessary to ascertain what was the direction actually given (which on this record it is not easy to do); and then to decide whether the judge had given the proper guide to the jury on that which would then have been an important issue. But if the defendant was not disqualified, and was entitled to vote, it was not material what he knew, or what knowledge would have subjected him to the penalties if he had been disqualified. Their Lordships think that on those findings of the jury, which are not impeached, judgment ought to be given for the defendant on the ground that he was found not disqualified; and consequently that it is no longer material to inquire whether he knew so much that his voting would have amounted to presumption, within the meaning of the Act, if the

findings of the jury, had amounted to finding that he was disqualified; so that even if there was misdirection as to this, there ought not to be a new trial for the purpose of ascertaining what is not material whilst the other findings stand. This is the only point on which their Lordships decide. It is necessary, in order to explain it, to say what the state of the record and of the evidence at the trial was.

The firm of McIlwraith, McEacharn, & Co. consisted of Andrew McIlwraith (a brother of the defendant), and Malcolm Donald McEacharn. The defendant Thomas McIlwaith was not a member of that firm, and had no interest in it.

The statement of claim was that by a contract or charterparty made on the 23rd of February, 1880, between the agent general of the Colony of the one part, and McIlwraith, McEacharn, & Co., "thereafter referred to as the party of the second part, for and on behalf of the owners of the ship *Scottish Hero* of the other part, it was agreed," and then it sets forth the stipulations of the charterparty.

Though there was on the statement of defence a formal refusal to admit that such a charterparty was made, it was not at the trial and is not now in dispute that there was such a charterparty, and that it, on the face of it, was such as is asserted in the statement of claim. It was signed by McIlwraith, McEacharn, & Co., and by Mr. McAlister, the agent general of the Colony.

The statement of claim then proceeds:—

"The said agent general and the said Andrew McIlwraith and Malcolm Donald McEacharn were respectively authorized by the Government of the said Colony and the owners of the said ship to enter into and did enter into the said contract or charterparty as agents for and on behalf of the said Government and the owners of the said ship respectively.

"At the time of the making of the said contract or charterparty, and thenceforward to the time of the commencement of this action, the defendant and Arthur Hunter Palmer and Andrew McIlwraith were registered as the joint owners of fourteen sixty-fourth shares in the said ship.

"At the time of the making of the said contract or charterparty, and thenceforward to the time of commencement of this

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action, the total number of registered owners of the said ship, including the defendant and the said Arthur Hunter Palmer and the said Andrew McIlwraith, did not exceed fifteen.

"In pursuance of the said charterparty, the said ship sailed on the voyage therein mentioned, carrying emigrants for the said Government as therein stipulated.

"On the 6th day of July, 1880, the 7th day of July, 1880, the 8th day of July, 1880, the 13th day of July, 1880, and the 14th day of July, 1880, while the said contract or charterparty was in full force and effect, the defendant knowing of the said contract or charterparty did, contrary to the provisions of the Constitution Act of 1867, sit in the said legislative assembly as a member thereof and vote therein, whereby and by force of the said statute the defendant for each and every such offence, to wit, on each and every of the aforesaid days, became liable to forfeit, and forfeited, the sum of £500 to the plaintiff.

"All things have happened, all times have elapsed, and all things have been done to entitle the plaintiff to recover from the defendant the said sums of £500, and each and every of them.

"And the plaintiff claims £2500 forfeited by the defendant as aforesaid."

The statement of defence was as follows:—

"1. The said contract or charterparty in the claim mentioned, purporting to be made by the said Andrew McIlwraith and Malcolm Donald McEacharn for and on behalf of the owners of the ship *Scottish Hero*, if it ever was made (which defendant does not admit), was so made without authority from the owners of the said ship, and contrary to the express directions of the defendant, and the defendant says that the said Andrew McIlwraith and Malcolm Donald McEacharn were not, nor was either of them, authorized by the owners of the said ship or by the defendant to enter into the said contract or charterparty, or any contract or charterparty, with the Government of Queensland for or on behalf of the owners of the said ship *Scottish Hero* or of the defendant.

"2. The defendant admits that he did sit and vote in the said legislative assembly on the days in para. 8 of the claim

mentioned, but he does not admit that he did so sit and vote knowing of the said contract or charterparty, or contrary to the provisions of the Constitution Act of 1867. And he says that before the days or any of the days or times in the said paragraph mentioned, to wit, before the 6th day of July, 1880, the voyage in the said contract or charterparty and in para. 7 of the claim mentioned had terminated, and that the emigrants carried by the said ship had been landed with their luggage at Townsville, in accordance with the provisions of the said charterparty, and that all the stipulations and conditions in the said contract or charterparty contained to be performed by the party thereto of the second part and by the owners of the said ship *Scottish Hero*, had been faithfully performed and completed, and that such performance and completion had been accepted by the Government of Queensland as and for a due performance of the said contract or charterparty, but the said Government had not paid the second moiety of the passage money payable under the same. Save as aforesaid the defendant does not admit that, on the days or any of the days or times in the said para. 8 of the claim mentioned, the said contract or charterparty therein mentioned was in full or of any force or effect, and does not admit any of the allegations in the said para. 8 or in para. 9 of the claim contained."

To this the plaintiff replied,—

"The plaintiff joins issue upon so much of the defendant's statement of defence as does not contain admissions of the plaintiff's case, or any part thereof."

The material part of the issue as to authority was whether the contract or charterparty was made so as to make the defendant party to a contract with the Government. Whether the other part owners of the *Scottish Hero* were or were not parties to such a contract was not material, though it is made part of the statement of defence. Nor was it material that the firm had made the contract professedly for and on behalf of the owners (that is, all the owners, including the defendant), unless they had authority on behalf of the defendant to do so. Some evidence was given that they had such authority.

It was proved that the firm were the general agents for the

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defendant to charter ships in which he held shares, and it was proved that Malcolm Donald McEacharn was, in compliance with 39 & 40 Vict. c. 80, s. 36, registered as the managing owner of the *Scottish Hero*. These facts were evidence from which the jury might have inferred actual authority to make all ordinary contracts for the chartering the ships. But the defendant and his brother Andrew McIlwraith gave evidence that when the firm of McIlwraith, McEacharn, & Co. entered into an agreement with the Colonial Secretary, acting as agent for the Colony of Queensland, on the 28th of February, 1876, by which that firm agreed to supply ships to carry emigrants on behalf of the Colony, the defendant required them not to employ any ships in which he had shares for that purpose, lest he, being a member of the Assembly, should be thereby made a contractor with the Government. And thereupon it was agreed that the firm might themselves charter the ship from the owners, including the defendant, and afterwards sub-charter it to the Government, and that, in all such cases, the remuneration of the defendant for the use of his share in the ship should be paid for to him by the firm, according to a rate independent of the amount which the firm received from the Government. This was embodied in a memorandum set out in the record. It was proper to be considered by the jury what this arrangement amounted to, whether it was bonâ fide come to, and whether it was still in force. The jury found, in answer to the third question asked by the judge at the trial, that the contract was made in the shape in which it was made on behalf of the owners (which would include the defendant), "contrary to the express directions of the defendant," and not only was this finding quite justified by the evidence above briefly stated, but it was not impeached or complained of in the Colony, though an ineffectual attempt was made at the Bar here to get rid of its effect. It is impossible to hold the defendant bound by a contract, though purporting to be made on his behalf, if made contrary to his express directions. No doubt the defendant might, on becoming aware of it, have ratified the contract, but no evidence was given that the defendant did anything that could amount to a ratification.

It was contended that it was within the scope of the authority

of the firm as general agents for the defendant to make such a charterparty as this on his behalf with the Colonial Government, and that, no notice having been given to the agent-general of the restriction on this apparent authority, the defendant was as much bound to the Government as if there had been no such restriction. It is not to be taken that their Lordships express any opinion, either one way or the other, as to whether, if this were made out, it would follow that the defendant was as much disqualified as if the contract had been made by an agent on whose authority there were no restrictions. It is not necessary to consider that question, for there is neither allegation nor evidence here of what would have entitled the Government to hold the defendant bound to them in the same way as if there had been no restriction on the firm's authority.

The principle on which a person, having clothed an agent with apparent general authority, but restricted it by secret instructions, is bound (if the other party chooses to hold him so) to one who, in ignorance of the restrictions, contracts through the agent, on the faith of the agent having the authority he seems to have, is well explained in *Freeman* v. *Cooke* (1). The principal does not actually contract, but the person, who thought he did, has the option to preclude him from denying that he contracted, if the case is brought within the very accurate statement of the law by Parke, B. (2): "if the person means his representation to be acted upon, and it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect."

In the present case, there is evidence that the defendant had made the firm his general agents, and that they were still so in all cases to which the restriction did not apply; and there would be a duty cast upon him to inform anyone who had dealt with

(1) 2 Ex. 654. (2) 2 Ex. 663.

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him through the firm as his general agents of the restriction on their authority. But though Mr. McAlister, the agent-general for the colony, was called and examined as a witness, there is no suggestion whatever made that he knew that the firm were general agents for the defendant, or that Donald Malcolm McEacharn was on the register as managing owner for the owners of the *Scottish Hero*. He knew that by the terms of the agreement with the firm they were to procure ships answering a particular description to carry emigrants, and that the firm were bound to the colonial Government to cause those ships to perform their agreement. It was not part of that agreement that there should be any privity of contract established between the Government and the shipowners (though the firm seem to have thought it was), and in all probability he did not care whether or not there was such privity. If he had asked, he would, no doubt, have been told that one particular part owner, the defendant, refused to allow any privity to be established between him and the Government, but that that part owner had chartered his share to the firm, and that they had full authority to employ it, and the colonial agent would in all probability have been satisfied. But it is enough to say that there is no evidence that the Government or their agent ever knew that the firm or any individual of it had general authority to bind the defendant, and acted upon the belief that such general authority continued unrestricted. It is not, therefore, shewn that the circumstances were such that the Government could have held the defendant bound to them.

Their Lordships, therefore, think that the rule was properly refused, on the ground that the judgment for the defendant was right, whether there was or was not misdirection on the question as to what would have amounted to presumption if the answer of the jury to the third question had been the other way.

They will, therefore, advise Her Majesty that the order of the Supreme Court should be affirmed, and the appeal dismissed, with costs.

Solicitor for appellant: *Randolph C. Want.*
Solicitors for respondent: *Ingledew & Ince.*

[HOUSE OF LORDS.]

WILLIAM NEILL AND MICHAEL FENTON APPELLANTS;
AND
THE DUKE OF DEVONSHIRE . . . . RESPONDENT.

H. L. (I.)
1882
Nov. 14.

Fishery in Navigable Tidal River — Prescription — Evidence — Judgment in Possessory Suit—Judgment by Default.

In an action for trespass to a several fishery in a navigable tidal river in Ireland the defendants justified on the ground that the public had the right of fishing. The plaintiff's paper title (if the possession and enjoyment were consistent with it) afforded irresistible ground for a presumption that the fishery was put in defence before Magna Charta. As evidence of possession and user the plaintiff tendered (inter alia) the proceedings and decree in 1687 in a "possessory suit" brought in the Court of Chancery in Ireland by C. (the plaintiff's predecessor in title) against strangers to the present action; by which decree an injunction was awarded to quiet C. and his undertenants in such possession of their fishing as they had at the time of exhibiting the bill and three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles:—

Held, that as the decree was a solemn and final adjudication, not collusive, and as it could not have been made except upon proof of unbroken user and enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings and decree were admissible; and that the effect of this evidence (not being met by any counter evidence applicable to the same period) was extremely strong to establish possession and enjoyment of the fishery in the latter part of the 17th century, consistent with the paper title and exclusive of the public.

Pim v. *Curell* (6 M. & W. 234) discussed.

Held also that a judgment obtained by the plaintiff in 1826 in an action against a stranger for trespass by fishing in the locus in quo, in which action the defendant appeared but allowed judgment to go by default of pleading, was evidence in the present action of possession in 1826.

The defendants proved that cot-fishing had been carried on in the locus in quo with the knowledge of the plaintiff or his agents and without interruption by them as far back as living memory extended:—

Held that if the plaintiff's right to a several fishery were once proved the exercise of cot-fishing could not take it away or confer any right on the public; for the public cannot in law prescribe for a profit à prendre in alieno solo, nor acquire any right adversely to the owner under any statute of limitation; and an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be "abandoned."

APPEAL from a decision of the Court of Appeal in Ireland, affirming a decision of the Exchequer Division (not reported),

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discharging a conditional order for a new trial. The facts proved at the trial and the decisions of the two Courts below are stated at length in the judgments of the Lord Chancellor and Lord Blackburn in this House.

The appeal was first argued in part February 13, 14, 1882, by *Macdonough* Q.C. of the Irish Bar (*R. O. B. Lane* with him) for the appellant, but was interrupted by the illness of *Macdonough* Q.C. It was resumed March 27, and continued March 28, 30, and 31; and May 1, 2, 4, 5, 8, by *Serjt. Hemphill* Q.C. (of the Irish Bar) and *R. O. B. Lane* for the appellants, who contended that there ought to be a new trial on the ground that the verdict was against the weight of evidence, and on the ground of misdirection and misreception of evidence. Their arguments sufficiently appear from the judgments, except upon the three points referred to in the headnote, upon which they argued as follows:—

1. The proceedings and decree in 1687 were not evidence of reputation, nor admissible at all, being inter alios, and not being final but to continue only till actions at law should be brought: *Pim* v. *Curell* (1); *Wenman* v. *Mackenzie* (2); *R.* v. *Antrobus* (3); *Evans* v. *Reed* (4); *Luttrell* v. *Lord Imham* (5). The Attorney-General was not a party to that suit, nor were the public interests in any way represented. Nothing said or done by a person having an interest and claiming a private right can avail to shew it unless the words or deeds are against his interest: *R.* v. *Debenham* (6); *Smith* v. *Blakey* (7); *Brisco* v. *Lomax* (8); *Weeks* v. *Sparke* (9); *Laybourn* v. *Crisp* (10).

2. The judgment in 1826 being obtained by default was not evidence. No judgment is evidence against strangers unless there be a verdict: *Reed* v. *Jackson* (11), which is explained in all the later cases as a case of verdict. The finding of a jury had a certain notoriety which took verdicts followed by judgments out

(1) 6 M. & W. 234.
(2) 5 E. & B. 447.
(3) 2 Ad. & E. 793, 795.
(4) 10 Ad. & E. 151.
(5) 7 Bro. P. C. 388, 393.
(6) 2 B. & Ald. 185.
(7) Law Rep. 2 Q. B. 326.
(8) 8 Ad. & E. 198.
(9) 1 M. & S. 679, 686.
(10) 4 M. & W. 320.
(11) 1 East, 355.

of the class of mere hearsay evidence. The action was not per se tantamount to an act of ownership; there was no notoriety, nor change of possession; the public were not concerned and no one knew anything about it. The judgment may have been obtained by collusion.

3. The evidence of cot-fishing was evidence that the several fishery if it ever existed was destroyed, lost, or abandoned: *Rogers* v. *Allen* (1); Woodrych on Waters, 2nd ed. p. 290; 1 Selw. N. P. Fishery, 12th ed. p. 752; *Mayor, &c., of Carlisle* v. *Graham* (2); 3 Cruise Dig. tit. Franchises, sec. 109, 4th ed. p. 270; *The Leicester Forest Case* (3). Non-user is evidence of abandonment of an easement: *Crossley* v. *Lightowler* (4); *Reg.* v. *Chorley* (5); *Reg.* v. *East Mark* (6); Gale on Easements, 5th ed. p. 594. The cot-fishing must be presumed to have been of right if a legal origin is possible, and that origin must be presumed if a possible one. If the grantee of a several fishery in tidal waters forbears to exercise his rights for centuries, the public meanwhile fishing openly as of right and without leave asked or given, it is against principle and common sense to suppose that the grantee can re-assert his rights and exclude the public.

At the close of the argument for the appellants on the 8th of May the House directed the case to stand over, and subsequently gave notice to the respondent's counsel that argument was desired only on the following points: 1, the admissibility and effect of the proceedings in the possessory suits; 2, the construction, and effect as evidence, of the Musgrave leases; 3, the effect as to the fishery in the whole river of the evidence of acts done in particular parts of the river; 4, the learned judge's manner of leaving to the jury the evidence as to cot fishing and the effect of that evidence.

July 24, 25. *Benjamin* Q.C. and *Samuel Walker* Q.C. (*E. T. Bewley* Q.C. and *John Atkinson* Q.C. with them, the last three counsel of the Irish Bar) for the respondent:—

1. The decree in the possessory suits being a judgment of a

(1) 1 Camp. 309, 312.
(2) Law Rep. 4 Ex. 361.
(3) Cro. Jac. 155.
(4) Law Rep. 3 Eq. 279; 2 Ch. 478.
(5) 12 Q. B. 515.
(6) 11 Q. B. 877.

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competent Court on a matter of public interest was admissible on the principle laid down by Parke B. in *Earl of Carnarvon* v. *Villebois* (1); *Laybourn* v. *Crisp* (2); *Pim* v. *Curell* (3). It is evidence of possession, though not conclusive. Any one of the public might have set up no several fishery in that suit. The Court will not interfere in a possessory suit unless the plaintiff has had three years actual and peaceable possession before bill filed: *Hemphill* v. *McKenna* (4). It is more than evidence of reputation, it is a strong evidence of ownership and a declaration of possession; a much more public assertion of a right than a lease: *R.* v. *Antrobus* (5); *Evans* v. *Rees* (6); *Reg.* v. *Leigh* (7); *Brisco* v. *Lomax* (8); *Wenman* v. *Mackenzie* (9); *Ashworth* v. *Browne* (10).

4. The evidence of cot-fishing is only legitimate as evidence of non-possession or non-occupation.

[Their arguments on the other points sufficiently appear from the judgments.]

July 26, 27. *Serjt. Hemphill* Q.C. replied.

The House took time for consideration.

Nov. 14. LORD SELBORNE L.C.:—

My Lords, in this case there have been two actions and seven trials; three trials in which the juries did not agree, two in which the verdict was against, and two (including the last) in which it was in favour of the Respondent. Unless your Lordships should have been persuaded that, at the last trial, the jury were misdirected as to any material question of evidence or other matter of law, you will probably be of opinion that this prolonged litigation ought at last to have an end.

The law relating to rights of fishing in navigable tidal rivers was, not many years since, explained in this House, in the case of *Malcolmson* v. *O'Dea* (11). I shall content myself with assuming

(1) 13 M. & W. 313, 331.
(2) 4 M. & W. 320.
(3) 6 M. & W. 234.
(4) 3 D. & War. 183.
(5) 2 Ad. & E. 788.
(6) 12 Ad. & E. 55, 167.
(7) 10 Ad. & E. 398.
(8) 8 Ad. & E. 198.
(9) 5 E. & B. 447; 25 L. J. (Q.B.) 44.
(10) 10 Ir. Ch. 421.
(11) 10 H. L. C. 593.

the general law to be as it was there explained; and, before adverting to the particular questions which your Lordships are now called upon to decide, I will state the leading facts, which I consider to be established beyond controversy, by evidence properly admitted.

The River Blackwater is a tidal navigable river, for considerably more than twenty miles, from a point a little below Lismore to the sea at Youghal. The lands on both sides (except some held by ecclesiastical corporations) anciently belonged to the Earls of Desmond. Whether their title was derived from Thomas Fitz-Anthony and John Fitz-Thomas, to whom grants were made by Kings John and Henry III. in 1215 and 1260, is not material. It is enough for the purposes of this appeal, that, before the reigns of Henry VIII. and Queen Elizabeth, "the lands of Decies and Desmond," which were included in the latter of those ancient grants, were among the undoubted possessions of the great house of Fitzgerald. In the twenty-first year of King Henry VIII. (1529), the "country of Decies" (on the left or east bank of the river) was, by an award of arbitrators on occasion of some difference between the then Earl of Desmond and his younger son, John Fitzgerald, declared to belong to the latter, and his son Gerald, and their heirs; and it does not appear that after that time the territory so separated from the earldom ever reverted to it. The lands on the left bank of that part of the river with which your Lordships are concerned in this appeal were, in 1613, in the possession of Sir John Fitzgerald, of Dromana (a descendant of the John of 1529), who, for his greater security, obtained a new grant of them from the Crown; and having afterwards passed to John Oge Fitzgerald and Gerald (or Garrett) Fitzgerald, who died respectively in 1627 and 1643, they became vested in an heiress, Katherine Fitzgerald, who, before 1683, married Edward Villiers. From that time they belonged, successively, to the families of Villiers and Villiers Stuart, ennobled under the respective titles of Grandison and Stuart de Decies. These lands it is convenient to speak of as "the Dromana estate."

In the charter from King James I. to Sir John Fitzgerald of 1613, "weirs" and "fisheries" are mentioned, in general terms, as

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appertaining to the manor and castle of "Dromany," and other manors, &c., therein comprised. The inquisition taken in 1627, after the death of John Oge Fitzgerald, mentions more specifically among the hereditaments connected with the manor, &c., of Dromany, of which he died seised, "three weirs (kidelli) in the water or river of Blackwater;" and among those connected with the respective lands, &c. of Dromore, Tinniscartie, and "the two Ardsallaghs," "two weirs upon the water or river of Blackwater," "one weir," and "one weir in the water of Blackwater" respectively. Dromore, Tinniscartie (now Tinnascart), and Ardsallagh, all lie upon the left or east bank below Dromana; and Dromore and Tinnascart are immediately ex adverso of the lands of Ballyphillip, on the western bank, near which the alleged trespasses on the several fishery claimed by the Duke of Devonshire, which are the subject of this action, were committed. The same weirs in the same places (except that at Ardsallagh) were in like manner described (being there called "gurgites"), in the later inquisition, taken in 1643, on the death of Gerald (or Garrett) Fitzgerald; and, in the same inquisition, another "weir upon the river aforesaid" is also mentioned as "pertaining to the land of Coolbagh," a township lying immediately below Tinnascart. The Dromana title to a several fishery in one-half of all this part of the river, ad medium filum aquæ, is now admitted by the Duke of Devonshire, though not by the appellants; the Duke claiming only a corresponding several fishery in the other or western moiety of the same part of the stream.

The Desmond title to the estates on the western side of the river became vested in the Crown by the attainder of Gerald, the last Earl of Desmond, and of some of his retainers in 1584. Those estates, and also other lands, &c., which had belonged to the dissolved abbey of Molanassa, situate at the head of the Broad of Youghal, were granted by Queen Elizabeth to Sir Walter Raleigh in 1587; and in 1590 Raleigh also acquired, by purchase from the Bishop of Lismore (with the consent of his chapter), the castle, manor, and lordship of Lismore, together with a several fishery in the upper tidal waters of the Blackwater, extending for many miles down the river from Lismore to a place (of which the site is not now exactly known) called

Comaun-Kildroneigh. That this was a several fishery is, on all sides, agreed; and although its lower limit is in dispute, it is certain that Comaun-Kildroneigh was several miles higher up than that part of the river in which the alleged trespasses were committed. My own opinion is, that it has been placed too high by the appellants, and (probably) too low by the respondent, and that it probably lay to the north of the rock, now called the "Jackdaw Rock," which is the northern limit of the fishery, ad medium filum aquæ, claimed as belonging to the Dromana estate. But the determination of that point is not necessary for the purposes of this case.

Sir Walter Raleigh was attainted in 1603, and by successive letters patent of King James I. in 1604, 1609, and 1613, and of Charles I. in 1630, the estates which (in the manner already mentioned) Raleigh had acquired, in the counties of Cork and Waterford, were granted to Sir Richard Boyle, to whom he had himself, on the eve of his attainder, executed a conveyance of all or the greater part of them. The title of the Duke of Devonshire is derived, through the Earls of Cork and Burlington, from this Sir Richard Boyle, himself afterwards created Earl of Cork.

It is necessary now to refer to some of the parcels in the documents of title, which shew what was possessed and what was forfeited by the last Earl of Desmond and his followers, who shared his fate, and what was granted successively to Sir Walter Raleigh and Sir Richard Boyle. Among these parcels in all the documents are the manor, castle, and lands of Shroncally (now Strancally or Shancally), with the appurtenances, of which the Earl of Desmond himself was seised at the time of his attainder; and the castle and lands, &c., of Ballynetra (now Ballyntray), which were at the same time forfeited by one of his followers named Maurice Gibbons. The manor and lands constituting the former of these denominations extended for several miles down the course of the river, from the place where it receives the waters of its tributary, the Bride; they lay immediately ex adverso of Dromore, Tinnascart, and Coolbagh, on the Dromana side; and they included Ballyphilip East, where the trespasses, for which this action was brought, are said to have been committed. The castle and lands, &c., of Ballyntray adjoined them, lower down the

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stream; and these lands appear to have extended to the neighbourhood of the possessions of the dissolved Abbey of Molanassa. As belonging to the manor, &c., of Shroncally the inquisition called the "Desmond Survey," made after the earl's attainder in 1584, specified the fishery of the River Omoore (that is Blackwater) and separately valued it at 66*s.* 8*d.* per annum, adding: "quæ quidem piscatio est bona pro piscibus, præsertim salmonibus, capiendis, et currit juxta prædictum manerium et terras circiter tria milliaria in longitudine." And in the inquisition taken in 1586 at Dungarvan, the same fishery is described as "quædam piscaria sive le weare, in rivolo de Owemore prope dictum Castrum." As belonging to the castle, &c., of Ballyntray, the Desmond Survey also specified the fishing "pro salmonibus et aliis piscibus in rivolo de Youghal;" valuing it separately at 10*s.* per annum. The grants, made after the forfeiture of Raleigh, included, not only the property which had come to the Crown by the Desmond forfeitures of 1584, but also the lands, &c., of the Abbey of Molanassa, and those purchased by Raleigh from the Bishop of Lismore. By the inquisition taken at Tallagh, on Raleigh's attainder, it was found that he was seised in fee (inter alia) of the manor, &c., of Lismore, and of the whole soil and bottom of the River Blackwater from both parts and sides of the river, and of the free fishery and watercourse there, extending from a place called Glanmore "as far as the two points of the mountain called Comaun-Kyldroneigh," and of the manor, &c., of "Shroncally, together with one weir for catching salmon upon the river of Awemore, to the manor and castle of Shroncally belonging;" and of the manor, &c., of Ballynetra, "with two weirs upon the river of Awemore aforesaid, and the moiety of the weir of Clarou;" and of the lands which had belonged to the Abbey of Molanassa, "with three weirs for catching salmon." In King James I.'s grant to Boyle of 1609 (which, as well as that of 1613, was made under a "commission of defective titles") the Strancally and Ballyntray fisheries were thus specified, "cum quatuor gurgitibus, et liberâ et regali piscatione totius rivi de Awmore, in dictis comitatibus Cork et Waterford;" and (in the habendum), "prædictum rivulum de Awmore, alias 'the Broade Water,' et liberam piscationem ejusdem;" also the Molanassa

fisheries, "et tres gurgites ad capiendos salmones, et liberam et regalem piscationem eorundem." The subsequent grant of 1613 (by which an annual fee farm rent of £109 12*s.* 3*d.*, always since paid, was reserved to the Crown), specified (besides four weirs upon the river "in or near Ballinetra") "the whole land and soil of all the said river, and the royal fishing and all other fishings of the whole river Awmore, from the sea, so far as the said river doth ebb and flow in the counties of Cork and Waterford." The parcels in the charter of Charles I. were similar and do not require more special mention.

These written titles (if the possession and enjoyment has been consistent with them) afford irresistible ground for a presumption that the fishery, either in all the tidal waters of the river Blackwater, or at all events in that part of them which is now immediately in question, was "put in defence" before Magna Charta; and having become vested in the Crown by forfeiture of the private rights from time to time acquired in it, was well and effectually granted to the predecessor in title of the Duke of Devonshire. The letters patent of King James I. and King Charles I. could not, of course, pass more than the Crown had then to give; they could not take away from the Dromana family (who had incurred no forfeiture) anything which rightfully belonged to them. But I cannot accede to the argument, that because the words of some of these grants would have been sufficient to pass the fishery in the whole river, if it had been then vested in the Crown, therefore they were ineffectual to pass the fishery in a moiety of those parts of the river in which the Crown had that, and no more, to give.

Under the circumstances which I have stated, the real controversy in this case is as to the sufficiency of the evidence of possession and enjoyment, without which, even the clearest apparent title to a several fishery, on paper only, would not exclude the public right. It is not disputed that the weirs ("kidelli," or "gurgites") mentioned in the documents of title to which I have referred, did, from a remote antiquity, exist; nor that they were used for fishing purposes more or less exclusive of the public; nor that, in more modern times, their number was increased. This, in my opinion, is important evidence of an actual and continual

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possession and enjoyment, in or near those places, at all events, of some several fishery or fisheries. Weirs ("kidelli" or "gurgites") were the means usual, in ancient times, for appropriating and enjoying several fisheries in tidal waters. These words meant more than the mere structures, projecting into the stream, from which the fishermen launched their boats and cast their nets, or conducted other fishing operations (*Malcolmson* v. *O'Dea* (1), and see the Year Book of 14 Henry VIII. there quoted). The Lismore weir or weirs constituted the base of fishing operations for the Bishop's fishery; and the Strancally fishery, described in the inquisition of 1586 as "quædam piscaria, sive le weare," extended, according to the Desmond survey of 1584, three miles in length ex adverso of the manor of Strancally.

We start, therefore, with this ancient customary mode of fishing, which, it is clear, has never ceased to be in use in the River Blackwater; and, for this purpose, I do not consider it to be material that rights of fishing from particular weirs, within particular local limits, may have become, from time to time, separated from the general right to the fishery of which these weirs may have originally formed part, and annexed, by actual or presumable grant, to the property in adjacent lands. The weir at Camphire, now belonging to the Usher family, between the lower terminus of the Bishop's fishery and the junction of the Bride with the Blackwater, is an instance of this kind. Among the documents already mentioned, some (namely, the inquisitions, including the Desmond survey, after the attainders of the Earl of Desmond and his followers, and of Sir Walter Raleigh) are themselves evidence of possession, and that of a strong, though not conclusive, kind. By those inquisitions the persons attainted were found to be seised, as of fee, inter alia, of the weirs and fisheries therein specified. Seisin is possession; and inquisitions of this kind are admissible against strangers, as containing the result of inquiries solemnly made under competent authority concerning matters in which the public are concerned: *Tooker* v. *Duke of Beaufort* (2); *Irish Society* v. *Bishop of Derry* (3); 2 Phillips's Evidence, part ii., chap. i., sect. 8. The inquisitions, after the death of John Oge

(1) 10 H. L. C. 619, 620. (2) 1 Burr. 146.
(3) 12 Cl. & F. 641, 662.

Fitzgerald and Gerald (or Garratt) Fitzgerald, are in like manner evidence of the possession by those persons of the weirs on the Dromana side of the stream. The later evidence of possession and enjoyment under the Crown grants, directly applicable to the locus in quo, consists, first, of a lease to one Strongman, under which rent is proved to have been paid, from Sir Richard Boyle (then Earl of Cork), dated the 29th of November, 1627, of one moiety of the lands of Ballyphilip (the other moiety being at that time also in lease to a Captain Jolliff); out of which there was reserved to the Earl, his heirs and assigns, "the river called Owmore, and the ground and soil wherever the said river runneth, and the fishing thereof;" and another lease, dated the 31st of March, 1628, to Thomas Swayn, of lands also at Ballyphilip (which had been included in the lease to Jolliff), in which "all fishings on the River Blackwater" were, inter alia, reserved to the Earl. These reservations, unless regarded in connection with the use of the weirs, would not be positive evidence of possession or enjoyment of a several fishery; but the leases, being certainly admissible as to the lands demised, cannot be rejected as to the accompanying reservations, whatever may be their weight.

I now come to the possessory suits of 1683–87, as to the admissibility and effect of the proceedings in which your Lordships thought it proper to hear the arguments of the Duke's counsel. Mr. Villiers and his wife, the heiress of Dromana, filed a bill in the Irish Court of Chancery against one Costelloe (agent to the then Earl of Cork) and others, the Earl's tenants and servants, alleging that the plaintiffs and their ancestors had been long in undisputed possession of a fishery, "with boats and all manner of nets not forbidden by statute, and other instruments, from a rock called Carrick-na-Tumpane" (the Jackdaw Rock) "to the Broad of Youghal, on the east side of the river, into the middle channel of the river" and also on the west side from Temple Michael (near the site of the Abbey of Molinassa) to the Broad of Youghal; and, after alleging that they had been disturbed by the Earl's tenants, &c., they prayed to be quieted in the possession of "three salmon weirs in the said river of Blackwater at Dromanamore, and two weirs of Dromanabegg, together with petty fishing for salmon on the said river" to the middle of the channel,

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so far as their lands adjoined the river. The Earl of Cork also filed a bill against Mr. and Mrs. Villiers, and some of their servants and tenants; alleging that he had been, for thirty years, possessed of "the whole piscary and fishery of the River Awmore, otherwise called Blackwater," and praying to be quieted in that possession against the defendants. Proofs were entered into on both sides; and a decree was, in the first instance, made for the Earl, mainly on the ground that he had not been made a defendant to Mr. and Mrs. Villiers' suit; but that decree was altered on a rehearing, after the bill in the latter suit had been amended so as to make him a defendant; and by the final decree of the Court, made in both suits on the 6th of May, 1687, an injunction was awarded to quiet Mr. and Mrs. Villiers and their under tenants "in such possession of the said weares and petty fishings" so far as their lands were adjacent to the river, "as they had at the time of filing their bill, and for three years before the same;" to continue until evicted by due course of law: and a like injunction was awarded to quiet the Earl and his under tenants "in such possession of their fishing as they had at the time of exhibiting the said Earl's bill, and three years before the same;" also to continue until evicted by due course of law; both parties being left at liberty to take proceedings at law against each other for ascertaining their titles, as they should be advised.

"Possessory suits" of this kind have been not unfrequent in Ireland (*Hemphill* v. *McKenna* (1)), and in England they were formerly not unknown (2). Lord Hardwicke considered them to be founded on an equity, derived from the statutes of forcible entries. They were maintainable, not on proof of title (as to which neither party was concluded by the decree), but on proof of at least three years' possession next before the filing of the bill. As to this, the decree was a final adjudication between the parties; and, in that respect, it was unlike those orders of the Duchy Court of Lancaster, which the Court of Exchequer, in *Pim* v. *Curell* (3), rejected as inadmissible, because they were merely interlocutory, and decided nothing between the parties to the suit.

I think it is clear, from the judgment of the Court in *Pim* v.

(1) 3 D. & War. 183. (2) 2 Ves. Sen. 415.
(3) 6 M. & W. 234, 236.

Curell (1) that if a final decree (similar to that of the 6th of May, 1687, between Lord Cork and Mr. and Mrs. Villiers), had been made between the parties to the suit in the Duchy Court (which was between rival claimants of a ferry across the River Mersey, the general public being no more represented than they were in the possessory suits between Lord Cork and Mr. and Mrs. Villiers), the evidence would have been held admissible. Lord Abinger's words, in that case, were, "In the cases where reputation is evidence, that is, cases involving a general right, in which all the Queen's subjects are concerned" (in which respect there is no difference between a several fishery and a ferry), "a verdict or a judgment upon the matter directly in issue between the parties (although between other parties) is also evidence; not, however, that it is evidence of any specific fact existing at the time, but that *it is evidence, of the most solemn kind, of an adjudication of a competent tribunal upon the state of facts, and the question of usage at that time.*" Mr. Taylor (Evidence, 7th ed. vol. i. p. 531, sect. 559) rightly observes, that such evidence, though admissible in cases in which evidence of reputation is received, is not itself, in any proper sense, evidence of reputation. It really stands upon a higher and a larger principle; especially in cases, like the present, of prescription. An adverse litigation before a competent Court, supported by proofs on both sides, and ending in a final decree, comes within the category of res gestæ, and of "declarations accompanying acts," at least as much as leases between private parties under which rent has been paid, or any other ancient deeds or instruments relating to the exercise of a prescriptive right: (3 Starkie's Evidence "Prescription," p. 907.) And when a general public right is (whether affirmatively or negatively) involved, it is difficult to see why the reasons for which inquisitions are receivable should not be applicable to such an adjudication. Inasmuch, therefore, as the proceedings and the decree in these possessory suits were offered and received in evidence only to prove the state of possession and user from 1680 to 1687, as to which the decree was a solemn and final adjudication between the parties (any one of whom, if he had no several title, and if there was a general public right, might have set up against the others

(1) 6 M. & W. 234, 266.

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that public right); as those suits were clearly not collusive, but were adversely litigated, on proofs of possession given on both sides; and as no decree could have been pronounced in them, except on proofs satisfactory to the Court of a possession by the plaintiffs in both, for at least three years before suit, inconsistent with any actual exercise, at that time, of a public right of fishing, I am of opinion that those proceedings, ending in that decree, were admissible in the present action, on the same principles on which judgments, inter alios, were admitted in *Reed* v. *Jackson* (1) and *Hemphill* v. *McKenna* (2), and on which the records in the several actions of the *Duke of Devonshire* v. *Morrissey*, the *Duke of Devonshire* v. *Hodnett* (3), and the *Duke of Devonshire* v. *Smyth* (4), were (in my opinion rightly) also admitted in this case. The effect of this evidence (not being met by any counter evidence applicable to the same period of time) is extremely strong, to establish a state of possession and enjoyment of the fisheries in question, in the latter part of the seventeenth century, consistent with the written titles, and exclusive of the public.

With regard to the eighteenth century, the appellants' counsel contended that there was no evidence, or explanation of the want of evidence, of any possession or enjoyment by the Duke's predecessors in title of any several fishery, other than the Bishop's fishery. This argument assumes that no such evidence is afforded by either of two leases, dated respectively the 11th of September, 1738, and the 20th of September, 1752, under which rents were proved to have been paid; both being from Richard, then Earl of Cork and Burlington, to Christopher Musgrave; and the latter (which was granted in consideration of a surrender of the former) being for three lives, two of them aged at that time respectively seven and six years. These leases together extend over the greater part of the eighteenth century and (probably) some part of the nineteenth. They are, in my opinion, admissible in evidence (whatever may be their effect), upon the principles stated by Mr. Justice Willes in *Malcolmson* v. *O'Dea* (5). As to their construction, it was insisted that the jury was misdirected by Mr.

(1) 1 East, 357.
(2) 8 Ir. L. R. 51, 52.
(3) 1 Hudson & Brooke, 322.
(4) 2 Hudson & Brooke, 512.
(5) 10 H. L. C. 614–616.

Justice Lawson, who considered them to be demises of the whole fishery of the river, to which the lessor was or claimed to be entitled, i.e., both of the Bishop's fishery and of the fishery or fisheries lower down the stream. In the Court of Appeal the Lord Chancellor agreed with the Lord Chief Justice in holding that they did not actually demise more than the Bishop's fishery; the Master of the Rolls inclining to the opposite view. The majority of the Court, however, held that difference to be practically unimportant, for a reason which will be presently mentioned. This was one of the questions on which your Lordships thought it right to hear the respondent's counsel. I myself agree with the construction placed upon those leases by Mr. Justice Lawson. It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee. The context of those two leases is conclusive against limiting "the salmon weirs and fishery in the River Blackwater," demised by them, to weirs or a fishery belonging or appertaining to "the lands of Ballyeen" (above Lismore) which had been just before mentioned. It is admitted that they extend, at all events, to the whole Bishop's fishery, which did not (in any sense) belong or appertain to those lands of Ballyeen. In their natural sense, they are proper to describe all the weirs and fishery on the River Blackwater then belonging to the lessor; and it is not now denied that the memorandum appended to the earlier, and the covenant contained in the later lease (to the effect that the Earl would, at his own sole expense, prosecute any person who, during the term, might erect or use any new weirs or nets "on the River Blackwater") are to be understood of the entire course of the river, and not only of its course within the limits of the Bishop's fishery. I see nothing in the context of either instrument to restrict the sense of the words, "the salmon weirs and fishery in the River Blackwater," unless it be the reservations of "the fourth fish as of right belonging to the Bishop of Lismore, and also the tenth fish or tithe belonging to the cathedral church of Lismore"; which reservations are applicable beyond doubt to the Bishop's fishery only. But these reservations (being strictly limited to that which already "belonged as of right" to the Bishop and the cathedral church, and

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which the Earl, therefore, could not demise) would be equally proper, whether the fishery demised were of the whole river, or of the Bishop's fishery only. I cannot, therefore, think that they are sufficient to restrict the natural construction of the preceding words. It follows that Mr. Justice Lawson did not, in my opinion, misdirect the jury on this point. But if that had been otherwise, I should still agree with those who have thought the point immaterial. In the other view, though the Bishop's fishery only was demised, the lease contained a contract for valuable consideration, that during its continuance the Earl would prevent (by prosecution if necessary) any increase of fishing, either by weirs or by nets, in the lower waters of the river which might intercept the fish before they could get up to the Bishop's fishery. This would not have been possible, as to nets, unless the Earl had been entitled to a several fishery in those lower waters. Between a demise and a contract such as this there appears to me to be no very substantial difference for the purposes of this case. In either view these Musgrave leases are important acts of ownership covering a long period of time, and consistent only with the possession of a several fishery in the lower as well as the upper waters of the river.

The evidence of possession on which the Duke relies as applicable to the present century, consists chiefly of two judgments obtained by him in two actions of trespass in the years 1826 and 1827 respectively. The first of those actions was against two persons named Morrissey, who had put up a new weir in the river at Strancally, and therefore in the same part of the river to which the present action relates. The erection of that weir was an encroachment on the fundus of the river, and might have been actionable though there had been no several fishery. But one of the counts in the declaration was for entering a several fishery of the Duke in the River Blackwater, and fishing therein, and catching and carrying away fish of the Duke, then and there found. The defendants appeared to the action, but did not plead; and judgment passed against them by default, on all the counts, for £30 damages and £24 5*s.* 9*d.* costs. There can be no doubt that this was evidence of the possession by the Duke of a several fishery in the locus in quo, admissible (whatever its weight) in the present action.

The other action, of 1827, was brought against a person named Hodnett, who defended it, and against whom judgment was recovered for nominal damages and £226 18*s.* 4*d.* costs. The counts in that action were similar to those in the action against the Morrisseys, and the only material difference was that the trespasses in Hodnett's case were committed lower down the river, between the site of the ancient Abbey of Molanassa and the head of the Broad of Youghal. This, therefore, will be a convenient place for considering the third question, on which your Lordships heard the respondent's counsel, viz., the effect, as to the fishery in the whole river, of evidence of acts done in particular parts of the river; and in connection with this I propose to advert to some other points which were insisted on during the course of the argument for the appellants. If the fishery of the whole river (so far as it belonged to the Duke or his predecessors in title) was what has been sometimes called a unum quid, there can be no doubt that evidence of acts of ownership and enjoyment in any part of it would be applicable to the whole. There was, as has been seen, important evidence, specifically applicable to the fishery in that particular part of the river which is immediately in question in the present action. But if the title to the fishery in that part of the river were separate, acts of ownership elsewhere would not be evidence of possession under that title. The Desmond survey, and the inquisition after Raleigh's attainder, do undoubtedly represent the fishery in that part of the western moiety of the stream with which your Lordships are immediately concerned, as belonging or appurtenant to the castle and manor of Strancally; and the Ballyntray fisheries are also, in the same documents, represented as manorial. On the other hand, the letters patent of 1609, 1613, and 1630 (though speaking of some weirs in connection with particular manors or lands) appear to treat the whole fishery of the river as unum quid. If I thought it necessary to determine whether the grantees, under these letters patent, could properly be regarded as thenceforth holding all the fisheries which had been forfeited by the Earl of Desmond and by Raleigh under one consolidated title, so as to make them unum quid, this case might perhaps have presented to me greater difficulty than it actually does. But it does not

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appear that this was the view on which Mr. Justice Lawson proceeded when he received evidence of acts done on different parts of the river, or when he directed the jury as to its effect. What he did was, to tell them that where there was evidence of the exclusion of the public right of fishing in the upper waters, the lower waters, and the middle waters on the Dromana side ad medium filum, the probability that the whole river had been put in defence before the time of legal memory was extremely great. It is unnecessary to say whether such a direction would have been right or not if there had been no evidence directly applicable to the locus in quo, or to the fishery ex adverso of the lands of Strancally. But there was such evidence; evidence, too, of great weight; and under these circumstances I think it would be against all common sense, and by no means in accordance with any requirement of law, if the learned judge were held to have been wrong in telling the jury that the evidence directly applicable to the locus in quo received strong, and indeed almost irresistible, confirmation from what was proved as to the rest of the river. The case made by the appellants, the defendants in the action, depended wholly upon the practice of cot-fishing; and their evidence as to that cot-fishing was applicable to the whole river, on both sides of the medium filum, from a point certainly within the limits of the Bishop's fishery, down almost, if not quite, to the Broad of Youghal. As against that evidence, counter evidence of the existence of several rights of fishery in all parts of the river was necessarily admissible, and being admitted, I do not think that the learned judge, in his charge to the jury, exaggerated its weight and importance.

In connection with this subject, I consider it proper here to notice a branch of the argument of the appellants' counsel, founded upon the fact that none of the riparian lands of Strancally and Ballyphilip (or indeed anywhere on the west side of the river, below Kilbree which is within the limits of the Bishop's fishery) belonged to the Duke of Devonshire when the trespasses, which are the subject of this action, were committed; it being admitted that all those lands were alienated by the ancestors of the Duke as long ago as 1738. From this fact your Lordships were asked to infer, either that all the rights of several fishery,

which had belonged to the manors within which those lands were situate, passed to the alienees of the lands, or that, the manors having been destroyed by the alienation of all the lands, the rights of several fishery thereby became extinguished: on either of which suppositions the Duke would have no title to bring this action. The alienation, however, of all or any part of the lands belonging to a manor, though it may sever the lands and (when they are all conveyed away) may destroy the manor, will not pass manorial rights, or anything more than is expressly conveyed, to the alienees; and the effect of thus destroying a manor to which a several fishery is appurtenant cannot be to extinguish the fishery, which (unless it passes by the conveyance to the alienees) must remain in the proprietor previously entitled to it as a fishery in gross. There was no evidence that either the manors or the fisheries were ever conveyed away by the ancestors of the Duke of Devonshire. The Duke's claim to this fishery is not opposed by any proprietor of riparian lands. The burden of shewing that it has passed to someone else is on those who say so. So far as any presumption of fact can be drawn from the evidence in the case, it is the other way. It is certain from several parts of the evidence, to which I need not particularly refer, that the Duke is now entitled to the bed and soil of the river, from which valuable lands, now belonging to him, have been reclaimed at and near Youghal. The reservations in the leases to Strongman and Swayne, in 1627 and 1628, shew that at that time, at all events, the fisheries were reserved, though the lands were demised. The Musgrave leases of 1738 (the very year after which rents ceased to be received by the Earls of Cork from the riparian lands) and 1752, shew that after the lands were parted with the Earls of Cork and Burlington continued to bind themselves, by onerous contracts, as owners of the fishery in the waters adjacent to those alienated lands. The judgment recovered in the action against the Morrisseys is evidence to the same effect.

Nothing now remains for me but to deal with the last question, on which your Lordships heard the respondent's counsel; viz., whether Mr. Justice Lawson's manner of leaving the evidence as to cot-fishing to the jury, was right, and what was the proper effect of that evidence. Shortly stated, the appellants' evidence

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as to cot-fishing was, that it had been carried on, upon all parts of the river, from a point above the lower terminus of the Bishop's fishery to one somewhat higher than the Broad of Youghal, during the present century, with the knowledge of the Duke or his agents, and without interruption by them, as far back as living memory extends; that many persons have practised it, forty or fifty cots at a time being sometimes seen on the same part of the river; and that the quantities of salmon taken in that manner were very considerable, and of very substantial value. This evidence is relied upon to shew, not (as in the case lately before your Lordships of *Goodman* v. *Mayor and Burgesses of Saltash* (1)), that this practice of cot-fishing is reconcilable with the existence of a several fishery in that part of the river; but for the opposite purpose, of establishing a general public right of fishing, and proving that, notwithstanding all the evidence of title and possession, adduced by the Duke, the river Blackwater was not "put in defence" before Magna Charta. The mode of fishing, by drift nets, practised by the appellants, is of recent introduction, and is wholly different from cot-fishing, and beyond comparison more destructive to the fish and more injurious to the owner of the several fishery, if a several fishery exists. Mr. Justice Lawson was, in my opinion, quite right in telling the jury, as he did, that the Duke's case, taken by itself, was one of such strength as almost (if not absolutely) to entitle his grace to have a verdict entered for him, but for the appellants' evidence as to cot-fishing; and also that, if the jury once came to the conclusion that the Duke, under the grants to his ancestors, had a several fishery in the river, the question of cot-fishing would become immaterial; "because no exercise of cot-fishing in the river, if it was really the several fishery of the Duke, could take away the several fishery from him, or confer any rights on the public." The public could not, in law, prescribe for a profit à prendre in alieno solo; they could acquire no right adversely to the owner of the several fishery under any statute of limitation; and "abandonment" which was suggested in the argument of the appellants' counsel, is a term which has no legal meaning as to an incorporeal

(1) 7 App. Cas. 633.

hereditament, such as a several fishery, which can only pass by deed. I think, also, that no just exception can be taken to Mr. Justice Lawson's way of leaving the question as to the effect of cot-fishing to the jury, when he said (1) "Still the question for you is, can you, as suggested, ignore all that body of evidence, and say that by reason of the cot-fishing a public right always existed, and still exists in this part of the river?" Was he, then, wrong in proceeding to suggest to the jury, that on considering the matter of this cot-fishing, and how it originated, a sufficient explanation of its exercise might be found in the early documents, and in parts of the parol evidence? He referred to evidence (of which there was much both documentary and parol) applicable partly to the Dromana fishery, and partly to Mr. Usher's weir fishery at Camphire; by which the fact was clearly established, that both in the seventeenth and in the present century, fishermen had been in the habit of taking from the proprietors of Dromana and of Camphire, and paying rents for, licences to fish with a limited number of cot-nets; and he suggested, as a conclusion proper to be drawn from that evidence, that there had been a usage prevailing among the lords of the riparian manors to give a limited right to fish with cot-nets to those who held farms within their manors. It is true that the evidence as to those licences did not apply to the fisheries claimed by the Duke. But the evidence as to the practice of cot-fishing on which the appellants relied was not confined to the fisheries claimed by the Duke, or on the Duke's side of the middle and lower reaches of the river. It applied equally to the Dromana side of the stream, and to the part of the stream adjoining Camphire; and if it could not be taken to establish a general public right in those places where fishermen had been in the habit of seeking and paying for licences to enable them to carry it on lawfully, I do not see how it could do so elsewhere (in the face of such a body of evidence as that adduced in favour of the Duke's title), though the proprietor or his agents might have suffered it to be carried on without any express licence. The Duke's ancestors (though not proved to have granted such licenses), were proved to have been in exclusive possession in

(1) Page 618.

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1680-87; and by the Musgrave leases of 1738 and 1752 they asserted and bound themselves to exercise the power of excluding, in their part of the river, "any new nets." The appellants' evidence of cot-fishing also extends to at least some part of the Bishop's fishery, which is admitted to be the property of the Duke. There, at all events, it must have been by sufferance, and not of right and (if so), why not also by sufferance elsewhere? Usage, continued during living memory, when there is nothing to the contrary, and when the question is one of prescription, may (no doubt) justify the presumption of a similar usage, as of right, from time immemorial. But when it is relied upon not to establish a prescriptive right, but to displace a prescriptive right, supported by written titles and evidence of long possession for a period earlier than, and coming down to, the time of living memory, it appears to me that such a presumption would be neither reasonable in fact, nor necessary in law. It would be extremely dangerous if titles, otherwise impregnable and supported by long enjoyment, could be overturned by evidence of that kind. "It is the wise policy of the law," said Mr. Justice Heath, in the celebrated gleaning case (*Steel* v. *Houghton* (1)), "not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligation."

My conclusion is, that this question, as to the practice of cot-fishing, was properly left to the jury; and that it was not entitled to any greater weight than the learned Judge gave to it.

I am, therefore, of opinion, that the evidence objected to in the case was properly received; that the learned Judge did not misdirect the jury on any material question of law; and that the verdict was not against the weight of evidence; and I move your Lordships that this appeal be dismissed with costs.

LORD O'HAGAN:—

My Lords, after the lucid and elaborate opinion pronounced by the Lord Chancellor, with which I substantially concur, I think it wholly unnecessary to go into a detailed discussion of the

(1) 1 H. Bl. 60.

documents and facts with which he has dealt exhaustively. I feel it the less excusable to waste time or trouble on such a discussion of them, as they have been even more elaborately considered in judgments, if possible, still more exhaustive, by the Court of Exchequer and the Court of Appeal in Ireland. I should content myself with a simple expression of concurrence with my noble and learned friend; but that the magnitude of the case, the number of the trials it has undergone with diversified results, and the conflict of decision, on points of general importance, between the learned judges whose conclusions it is our business to review, make me desirous of indicating briefly the views I have been led to entertain on some of the most material of those points.

To the pleadings in the case I advert only for the purpose of pointing to the admission they contain, that the bed and soil of the River Blackwater are vested in the respondent, and are his unquestioned property. That admission does not conclude the controversy, in which the appellants deny the respondent's title to a several fishery, and claim for the public a right to fish in the river, as having been, from time immemorial, a navigable stream in which the tide ebbs and flows. But it is not wholly immaterial, in some of the aspects of the case, as it has been determined by the Court of Common Pleas in Ireland (1), in a judgment approved by the Court of Exchequer in England (2), and again by the Court of Exchequer in Ireland, in its ruling with respect to a previous trial of the present action (3), that the exclusive right of fishing in a private river by a private owner, and the right of the Sovereign to grant a separate fishery in a tidal river, "depend upon the existence of a proprietorship in the soil."

Upon the general principles which must govern our opinion, there has not been and there could not be the suggestion of a doubt. The right of the Sovereign exists in every navigable river where the sea ebbs and flows. Every such river is "a royal river, and the fishing of it is a royal fishery, and belongs to the Queen by her prerogative" (4). "The right of fishing in the

(1) Ir. Rep. 2 Com. Law. 143.
(2) Law Rep. 4 Ex. 361, 368.
(3) Ir. Rep. 2 Q. B. C. P. & Ex. D. 172.
(4) Sir J. Davies, Rep. 56.

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sea," according to Lord Hale, "and the creeks and arms thereof, is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river" (Hargrave, Law Tracts, De Jure Maris, pars prima, cap. 4, p. 11.)

This matter is clear, and it is equally so that a subject may have a right of fishing in a tidal river either by a grant from the Sovereign or by prescription. But unless a several fishery in tidal waters was in being before Magna Charta, it cannot be created by subsequent grant. If it was previously appropriated either by the Crown or a private person, or, in technical language, "put in defence," there may be an effectual grant of it. Proof of previous appropriation, by documentary or parol evidence, at such a distance of time, cannot be obtained, although there may be plausible antiquarian speculation about it; and, therefore, from the necessity of the case, the doctrine which this House accepted in *Malcolmson* v. *O'Dea* (1), determined that possession and user of a fishery, as several and exclusive, continued for a sufficient period, justifies the assumption that it had its origin legally and not illegally, and at a period at which the law permitted it rightfully to originate, although so remote as to render evidence of the circumstances of its creation unattainable.

The question in this case is, whether the respondent has been able to bring it within the operation of these indisputable principles? He has undertaken, and the burden of proof is on him, to shew that the fishery in question has come to him under a valid and effectual grant of the Crown, which has been sustained by the continuous use and enjoyment of himself and his predecessors.

If the documents in evidence had commenced with the patent of James I., bearing date the 3rd of March, 1613, the first three objections raised by the appellants' counsel at the close of the trial would not have had the apparent force which they have been made to derive from those of antecedent periods. By that patent, in words perfectly clear and unequivocal, not only did the patentee receive a grant of "the ground soil and bottom whereupon the river Owenmore, alias the Broadwater, alias the Blackwater, runneth

(1) 10 H. L. C. 593.

and holdeth its course," but, also, of "the water and watercourse, and all the whole fishery and royal fishery of the said river," and, again, "of the whole land and soil of all the said river, and the royal fishery and all other fishings of the whole river of Owenmore aforesaid from the sea, so far as the said river doth ebb and flow in the counties of Cork and Waterford, or both or either of them." Another enrolled patent of Charles I. confirmed the grant so made, and employed similar language, as taking away "all doubts and questions" about it. Words at once more comprehensive and more precise could not have been employed to vest the fishery now in dispute in the grantee of the Sovereign. And if there was an appropriation of it before Magna Charta, and if that appropriation was properly evidenced by subsequent user and dominion as of right, the title of the respondent is established.

But, by the objections to which I am adverting the appellants put in the front of their defence that, in the entire tract of time, from the twelfth century to the end of the sixteenth century, to which many of the documents in proof have reference, there is no trace of such a fishery by the Crown or its grantees as the plaintiff claims; and, further, that such rights of fishery as those objections regard were only territorial or manorial. They say that, therefore, the patents of James and Charles were void, the Sovereign having been deceived, and having affected to give that which did not belong to him. This is a strong proposition in relation to solemn grants of such antiquity and authority and deliberately made by the Crown, if followed, as the respondent alleges they have been, by the exercise, ever since, of the rights of property and enjoyment which they warrant. But the older documents do not seem to me to sustain the objection. They are not very clear in some respects, and their relevancy to the issues in the cause is not always apparent. They do not, in terms, describe the river as "put in defence," and they do connect the right of fishing, at Strancally and elsewhere, with manorial possession; but they seem to me to give persuasive indications that, in ancient times, there had been a large though undefined appropriation of that right, and an exclusion of the public from the enjoyment of it.

The upper division of the fishery, which had belonged to the see of Lismore, is admitted to have been a several and exclusive

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property, from the time of King John. The abbey of Molanassa had such a fishery in the lower part of the river, until it was dissolved, when Raleigh obtained the possession of it. The survey on the attainder of the Earl of Desmond, in 1584, found that he was entitled to the manor of Strancally, "with the fishing of the river aforesaid belonging to the said manor, which said fishing is good for taking fish, principally salmon, and runs near the said manor and lands thereof about three miles in length." This was the scene of the trespass with which we are dealing, and the fishery, so described, was on the western half of the river, the eastern half belonging to the Fitzgeralds of Dromana, *usque ad medium filum aquæ*. The inquisition upon Raleigh finds two weirs on the Blackwater; and he conveyed to Boyle the castle and town of Lismore, "with the River Awenmoare and the fishings and benefits thereof." The proofs establish, I think, the correctness of the opinion of the Court of Exchequer, "that the Earl of Desmond was, at the time of his death, seised of all the manors on the west bank of the Blackwater from the termination of the Bishop's fishery to the Glandine, forming the boundary between the counties of Waterford and Cork, and that as parcel of each manor the Earl was seised of some portion of the bed and soil of a tidal stream, and, as incident to the property in such bed and soil, had an exclusive right of fishing in the waters flowing over same." (1) And according to that view, the transfer by Raleigh and the patents of the Kings only conveyed to Boyle, in substance and effect, with the manor and fishery of Lismore, and the possessions of the Abbey of Molanassa, the estates which had belonged to Desmond, which had been forfeited to the Crown, which were given to Raleigh and conveyed to Boyle, and have been transmitted to the respondent.

There may not be full accordance between the state of things imperfectly exhibited in the ancient documents, and that which is implicitly assumed to exist by the patents of James and Charles; but these documents appear to shew appropriation for individuals and exclusion of the public, so long as we have any available record, and the existence of a several fishery, regarded either as broken into sections or constituting a combination

(1) 2 Ir. Rep. 2 Q. B., C. P., & Ex. Div. 175.

in their entirety, under the donative or confirmative grants of the Crown. The patent of 1613 includes as well the estates of Desmond as the lands and fisheries acquired by Raleigh, and the view presented to the jury by Mr. Justice Lawson,—that the conceded right of the respondent to exclusive dominion over the Lismore division of the river which had been appropriated by the bishops before the time of legal memory, and his control over the lower part which had been so appropriated by the monks of Molanassa, with the evidence as to the exclusive claim of the Dromana family to a fishery in half of the intervening portion of the stream, might well be considered by them as founding the conclusion that the whole had been so appropriated,—appears to me to be right and reasonable.

These considerations go far to negative the theory of the appellants, that the patents under which the respondent claims were obtained by Boyle through a deception of the Sovereign, or an assumed authority or title, which did not legally appertain to him. And this being so, and the terms of those instruments being, as I have said, comprehensive and precise as to the properties conveyed, I concur with the Lord Chancellor, that the real question is as to the sufficiency of the evidence of possession and enjoyment which is required to validate the paper title.

That evidence was very considerable in amount and very various in its character, and, for the reasons I have already given, I do not mean to go over it again. The judgment of the Master of the Rolls has left nothing to be added profitably about it. I shall merely indicate its general nature and effect. It was furnished by proof of the existence and possession of the several fisheries of Lismore and Molanassa; by the survey on the attainder of the Earl of Desmond, and the inquisition, which shew that he enjoyed Strancally and its fishery, "and the river of Owemore;" by leases as well of the Earl of Cork as of the Villiers family, assuming authority to make demises and to reserve exclusive rights upon the river; by the proceedings and decree in the possessory suit,—one of the matters to which I shall again advert hereafter; by the continual claim of the Earl of Cork to the possession of the entire fishery of the Blackwater, as well in those proceedings as in others of a public nature, such as

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the inquisition post mortem on the death of Sir John Fitzgerald, in May, 1620; by the repeated assertion of that right in actions at law, sometimes with successful result; by controversies in which various persons from time to time sought to intrude upon the several fishery, and were resisted effectually, in the interest now represented by the respondent; by various leases of the foreshore of the Blackwater, at Youghal, between low and high-water mark, and various judgments in ejectment for portions of that foreshore reclaimed from the sea, and writs of habere under which possession of them was obtained; by judgments in actions for trespass upon the soil and bed of the Blackwater and the erection of weirs upon it, and for trespass on the several fishery of the river and taking salmon in it; and by the working of that fishery by tenants of the respondent,—acting under his licence, for which a large yearly rent was paid,—who prevented others from fishing, and compelled the removal of weirs adversely erected, or received payment for permission to use those weirs.

This mass of evidence, which appears to me to have been pertinent, consistent, and persuasive, went to the jury subject to some objections, to the principal of which I shall shortly advert; and I think it impossible to say that it did not make a powerful case as to the user and enjoyment of the fishery for centuries,—a case so powerful as, in the absence of countervailing proof, to have been conclusive in sustainment of the documentary title and the respondent's right. To the admissibility of this evidence, generally, no objection was made, or, indeed, could have been taken. Of the effect of it, the jury were the judges. But, in some respects, it was impeached as inadmissible, and, in others, the mode in which it was dealt with by the judge was made matter of complaint. I shall not go through all the points affecting it, but as to a few of them I shall say a word. The most important connected with this case, and in its general interest, was that which concerned the admissibility of the proof as to the possessory proceedings between Lord Cork and the Villiers family.

Proceedings of that sort have not been common in England; but, in the less settled days of Ireland, they were often employed for the purpose of quieting the possession of persons who

were disturbed or threatened with disturbance. They dealt with that possession only, and not with the title to it; and the remedy sought was not an adjudication of rights, but an injunction to continue the *status quo* until those rights could be considered and determined. The fact of possession, for a certain time, was sufficient to attach the jurisdiction, but it must have been a possession clear, complete, and conclusively established; and, on proof of this, the Court intervened to prevent its interruption by violence or wrong, and afford full opportunity for having any litigated question raised about it decided by a competent tribunal and in a proper way. The proceeding by possessory bill was derived from the civil law, which gave to any one who had undisturbed possession for a year, and was deprived of it, or threatened to be deprived, irregularly, the means of recovering or retaining it by summary process, and without direct investigation of his claim. It was called *festinum remedium*, and, in its swift action, left claims of right untouched. In Ireland, the possession necessary to found a demand for an injunction was of three years, and not of one; and, as I have said, it must have been shewn, to the full satisfaction of the Court, to have been peaceable and continuous. "Although," it is said in Howard's "Equity Exchequer" p. 533, —an old Irish book of practice, in its day of high authority,—"a man gets into possession by force or fraud, if he continues in an entire possession for three years he is entitled to an injunction upon a forcible entry, for no man is to raise a remedy for himself, nor to make use of force to restore himself, but ought to apply to a Court of Equity to be relieved against the fraud and to be restored to the possession in a legal manner, or he may bring his ejectment and have his title tried at law." This proceeding, though now comparatively rare in Ireland, is not wholly obsolete. I have myself administered the jurisdiction, as Lord Chancellor, by granting an injunction in the case of *Lifford* v. *Quin* (1), which was a possessory suit for the staying of waste. But it seems to be, practically, at present unknown in England; where, however, it was formerly recognised by Lord Hardwicke, who regarded it, with Howard, as "founded on an equity derived from the statutes of forcible entries." (2 Vesey, senior, p. 415.)

(1) 7 Ir. R. Eq. 348.

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Mr. Villiers and his wife claimed by their bill a fishery "on the east side of the river into the middle channel." They alleged disturbance and prayed that they might be quieted in their possession of three salmon weirs in the Blackwater at Dromanamore, and two weirs at Dromanabeg. Lord Cork, on the other hand, filed his bill against them, asserting his possession of the "whole piscary and fishing of the river Awmore," otherwise the Blackwater; and prayed that he might be quieted in that possession. Both suits came to a hearing; and a decree was made in both, granting injunctions to quiet the several plaintiffs in the possession of the fisheries which they respectively had, at the time of the exhibiting their respective bills in Chancery, and for three years before; "to continue until evicted by due course of law, the Court thinking fit to leave both parties at liberty to take their remedy, each against the other, for ascertaining their rights as they should be advised." No further proceedings appear to have been instituted; and no legal decision as to the conflicting titles was ever obtained.

But the decree so made necessarily presupposed and established that the Court had been satisfied, by sufficient evidence, of the Villiers' possession of the weirs claimed by them on the Dromana side for a period of three years, and of the Earl's possession, for a similar period, of an exclusive fishery on the side opposite. I am of opinion that the objection to the admissibility of the proceedings is in no way tenable. The value of them is another question. It seems to me very material; although I do not quite agree with the observation that, as either of the conflicting parties might have rested, for the defeat of his antagonist, on the existence of a public right of fishing inconsistent with the exclusive claim put forward, and as no such right was alleged by either in the course of those proceedings, ground was laid for inferring its non-existence by reason of its non-assertion. The public were not represented and the interests which both the litigants designed to guard were private and exclusive, and adverse to such a claim on the part of the community; which they might not, therefore, have thought it for their benefit, on either side, to advance.

I think the proceedings were admissible, not as evidence of reputation, which I agree they are not, but of something higher

and better than reputation; because, for the purpose of the suit, in which such evidence must have been admitted, and having regard to its real scope and object, the decree was final, determining the only question before the Court, and for its determination necessitating the production of evidence, and a judicial conviction founded upon it, that a real, peaceable and unequivocal possession of the very subject matter now in dispute, was enjoyed by the Earl of Cork two hundred years ago,—in the words of Chief Baron Palles, pronouncing for the Court of Exchequer in favour of its admission,—"Of the possession in fact at the time of the bills being filed of the several fishery": *Devonshire* v. *Neill* (1).

The objection which seems to have been entertained, by one of the learned judges of the Court of Appeal, that the decree was only interlocutory and not final, appears to me to have no foundation, and not to be sustained by the case chiefly cited to support it. It was not an order made in the progress of a cause, to be afterwards reconsidered and modified or reversed. It was the concluding and conclusive ruling of the Chancellor on the only question submitted to him; *causa finita est.* Nothing was left undecided which was capable of competent decision in the controversy; and, if the parties desired an adjudication as to title, they were left to seek it in an entirely new suit, freshly begun, differently constituted, and with an object wholly separate and distinct.

One of the chief questions on which your Lordships required further argument, and heard it, at considerable length, regarded the admissibility of acts and transactions done and occurring on portions of the Blackwater above, below and opposite to the place at which the alleged trespass was the subject of complaint. The proof of possession of an extensive tract of land or a great river, such as this, must, of course, vary according to circumstances. What may demonstrate it, in one case, may be quite inadequate for that purpose, in another. The ordinary mode of user of properties of the kind,—the circumstances requiring or excusing particular modes of action with reference to it,—the courses which its owner, conscious of his rights, might be reasonably

(1) 2 Ir. Rep. 2 Q. B., C. P., & Ex. Div. 157.

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expected to pursue, in the assertion and protection of them,—may be indefinitely various, and must all be considered, according to their nature, when the fact of his possession, as proved by his conduct, comes to be ascertained. The proprietor of a river or a waste cannot be expected to prove proceedings indicative of his ownership, on every portion of the one or the other. He can only shew his exercise of dominion over certain parts in accordance with a claim of title to the whole; and whether as to the whole, evidence as to the parts can justly found the desired inference, must be determined by its character and extent and the effect which can be fairly given to it by an informed tribunal. And if a river can be taken to be, as described in not very elegant jargon,—a *unum quid*, a connected and unbroken entirety,—such evidence, as none other of the fact of possession throughout is possible, may be, in the highest decree, satisfactory and decisive.

In this case, the natural character of the Blackwater was that of a single stream, running in a continuous course from Lismore to Youghal. It was not broken or divided or separated into sections. In the documents ranging through the great period of time, from the thirteenth to the eighteenth century, it is described and dealt with as a single river,—integral and identical,—by various titles, but all descriptive of the one thing, the Awemore, the Owmore, the Broadwater or the Blackwater. The claim of Raleigh, of Boyle, and the respondent was and is to a several fishery in the one river, so variously denominated, with all its tidal waters; and their documentary title gave them that several fishery throughout those waters which the possessory acts in dispute are adduced to confirm. The Bishop's fishery was held by a separate title; the Molanassa fishery was also so held; but these were both in reaches of the same undivided stream, and they both became the subject of the same grants, which gave, as I have said, to the patentee of 1613, "the royal fishing and all other fishings of the whole river Awemore from the sea so far as the said river doth ebb and flow, in the counties of Cork and Waterford or either of them."

On these large grants the respondent rests his claim to a several fishery, not in a portion of the river but in the whole. The real question is not as to Strancally only, or the fishery there,

but as to that of the entire river. The claim to resist the particular trespass rests on the general proprietary title. It seems to me impossible, in such a state of facts, to doubt as to the admissibility of the class of evidence to which I am adverting.

The possessory decree on which I have observed was properly offered in proof of the fact of possession of a fishery in all the river; and I think that the exclusion from the consideration of the jury of the existence of the several fishery at Lismore and the fishery at Molanassa, as furnishing grounds for a probable inference as to the existence also of a several fishery in the intervening waters, would have been as unreasonable as it would have been illegal. If it were so, the fact of the appropriation before the time of legal memory of the fishings in the tidal waters above and below Strancally, and *usque ad medium filum* on the Dromana side, was surely pregnant and persuasive, as to the probability of the non-existence of a right in the public to exercise the unlimited licence which is claimed by the appellants. As the pleadings stood and on the issues knit between the parties, I am of opinion that evidence of acts and proceedings with reference to the river generally,—the leases, the covenants, and reservations, the actions, the judgments, the licences and the successful assertions of right under the patents,—was properly admitted.

There has been much discussion on the Musgrave leases. They were plainly admissible in proof; and the only arguable point which affects them regards alleged misdirection, as to the construction to be put upon them. That objection does not appear to have been properly taken at the trial; and, unquestionably, an Appellate Court should be slow to entertain a question which should have been raised and discussed when, if the attention of the judge had been called to it, error might have been corrected, and further litigation, vexation and expense saved to the litigants. But, taking matters as they stand, I am of opinion that the objection ought not to be allowed to invalidate the verdict. The lease of the 11th of September, 1738, which was followed by that of the 20th of September, 1752, contained a demise from the Earl of Cork to Christopher Musgrave of "the farm and land of Ballyeen, as the same are now in his possession, together with

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the salmon weirs and fisheries on the river Blackwater, and also the mills of Ballyeen and the ferry of Lismore, together with a house and garden at Affana," &c., for forty-one years, at a rent, and on payment for the salmon taken. This lease has a memorandum stating that if new weirs or nets should be used on the River Blackwater, prosecutions should be instituted at the lessor's expense. The second lease made a demise in similar terms, with a covenant that if new weirs or nets should be used on the river, the persons using them should be similarly prosecuted at the expense of the Earl. Mr. Justice Lawson held that these leases made a demise of the fisheries of the entire river; but it has been contended that the demise was only of the upper portion, to which the respondent is confessedly entitled. There has been much division of judicial opinion on this point, and I was disposed through the course of the argument to agree with the Lord Chancellor of Ireland and the judges of the Exchequer, that the view of the learned judge was erroneous. A certain amount of improbability, that such a large demise should have been contemplated, appeared to me to be suggested by the context and the nature of the instruments; in connection with a want of reference in the tenendum to the entire fishery of the river and the memorandum and covenant imposing on the lessor a burden which the lessee might more properly have borne, if the whole of the river was his, during the term. Undoubtedly, the words of demise are very large, and give countenance to the judge's construction; and I am not prepared to say that it is manifestly wrong. But the duty cast upon this House by the Judicature Act does not appear to me to make the question material for the purpose of our decision. I do not believe that the error, if error there was, occasioned any "substantial wrong or miscarriage" which could have wrought injustice. I do not think, the leases having been legally in evidence and submitted to the consideration of the jury, that their verdict was really affected by it to the detriment of the appellants, whose counsel did not press the point upon the Court; And I am of opinion that, in accordance with the direction of the Act, your Lordships should refuse, because of it, to grant a new trial on the ground of misdirection.

Another objection was based on the allegation that the respondent

and those from whom he derives had ceased to possess for a considerable time the manors on the west side of the river, to which the right of fishery, if it legally existed, had been ancillary and accessorial; and that, with the loss of them, that right had been extinguished. But, in the first place, it is again to be noted that the property in the bed and soil of the river, with all its proper incidents, admittedly remains in the respondent. Next, there is a lack of sufficient proof that the manors on the west side have passed from his possession. And further, there is no evidence that he or his predecessors at any time conveyed to any one the right in his several fishery, if that right ever belonged to him or them.

No deed or instrument of title alienating such a right has been relied on by the appellants; and even though it was accessorial to the soil of the manors, if it was once vested, under a patent followed by such user as should legally be held to make the grant effective and justify the finding that the fishery had been put in defence before Magna Charta, I agree with the unanimous opinion of the Court of Exchequer that the liberty of fishing being once in the subject as incident to the soil, "the parting by him with the soil would not be necessarily a parting with the liberty, for the soil may be parted with, reserving the liberty as an incorporeal hereditament."

The effect of the proof upon this part of the case was simply that, for some of the manors adjacent to the river, the plaintiff and his predecessors have not for a number of years received rent, and that they have been in the possession of other people. But, whatever may be the truth of the matter, no deeds have been produced effectuating the alleged transfer, which, as I have said, even if it had been established, would not have involved the destruction of a manorial right to a several fishery theretofore vested in the owner of the land.

The learned judge under these circumstances declined to ask the jury, "whether the soil of the river, or the liberty of fishing at the place of the alleged trespass, had passed from the representatives of the patentee of 1613?" And he appears to me to have been justified in making that refusal.

I do not know that there is any other point, either as to

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admission of evidence or misdirection of the jury, to which I can usefully advert. If the views I have adopted be correct the respondent's title—founded on royal grants of rights appropriated beyond the time of legal memory, and confirmed by subsequent usage and enjoyment, on which properly admitted evidence was submitted to the jury—appears to be complete. Does the proof as to cot-fishing, on which the appellants rely, displace that title; or was that proof so wrongly dealt with by the judge as to make their verdict legally assailable?

There was abundant evidence that upon a great part of the river, including a portion of the Bishop's fishery and extending through the spaces in which the trespass is complained of, the practice of cot-fishing has been for a multitude of years pursued largely, continuously and without interruption; although on the lower part of the stream, towards Youghal, the proof did not establish the existence of such a practice, so allowed.

That proof was submitted to the jury as bearing on the questions whether a several fishery was vested in the respondent and his predecessors, and whether the river had been appropriated to the exclusion of the public right? But it was insisted that the jury should have been further asked to consider, whether the respondent and his predecessors had abandoned the right to a several fishery? I think that the appellants made no case of abandonment which should have been submitted. Without discussing the view of one of the learned judges of the Exchequer, that, "in point of law it is not possible for an abandonment to take place of a fishery in the manner suggested," it may be enough to say that no sufficient authority to the contrary has been adduced, and that a mere interruption of the possession under an established title in such a property cannot be held to have destroyed it. An interruption may have been permitted through the absence of the proprietor; or through his ignorance, partial or complete, of the acts relied on; or through his neglect or indifference to them as not vitally affecting, in his own case, his interest or position; or as requiring from him, for the purpose of resistance, effort or expense unjustified by the necessity of the case; or as allowed from kindly or benevolent motives to humble people for a great length of time. And it would not seem just, as it would not be

legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate. The Master of the Rolls has said, in his judgment in the Court of Appeal, "If anything is clear, in my opinion it is that the Duke and his ancestors never abandoned their claim to the several fishery." That claim was repeatedly urged, as we learn from the old documents, by the patentee of 1613. It was solemnly put forward in the necessary proceedings. It was made in the leases, the reservations and the covenants to which I have adverted; and it was asserted, continuously and consistently, whenever the occasion for making it arose, down to the time of the respondent and the successful institution of suits by which in particular instances he encountered interference with it, and until drift net fishing, practised by many great nets stretched across the river and barring the ascent of salmon, was substituted for the fishery by cots, which had been comparatively innocuous.

I do not think it necessary to advert to the evidence which was given as to the licences accepted by the cot-fishers, on certain portions of the river, from some of the proprietors having manorial rights upon its borders. But, upon the view I have presented, I am of opinion that the learned judge was not only right in refusing to put to the jury any question of abandonment; but further, that, having stated to them that the evidence as to cot-fishing was properly entertainable, "to induce them to come to the conclusion that the fishery was one of comparatively modern origin, that is to say, that it had no existence at an early period of our history, but was only created when these grants were made," he was right in putting, as the question for their consideration, whether, "by reason of the cot-fishing, a public right always existed, and now exists, in this part of the river?"

In answer to a question by the foreman, he told the jury further that it was left to them to say "whether the Duke had a several fishery before Magna Charta?" They found in the affirmative, and their verdict, right or wrong, is legally unimpeachable for misdirection.

The rule for a new trial was obtained on the ground, inter alia, that that verdict was against the weight of evidence. I am not prepared to say that it was; and the less, because I find that the

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Lord Chief Baron, in pronouncing the judgment of the Court of Exchequer, concludes with these words:—"Mr. Justice Lawson reports that he entirely approved of the verdict; and as I myself have presided at nisi prius at a former trial of this case, I may add that I concur with Mr. Justice Lawson in that opinion."

The approval of a verdict by the judge who tries a case has always, for reasons which I need not detail, been deemed worthy of high consideration when it is assailed as being against the weight of evidence; and that approval may in this case be urged with greater force on behalf of the respondent, when it is confirmed by the opinion of another learned judge, who had equal opportunity of estimating the demeanour of the witnesses and the effect of their testimony, who had twice occasion, in the Court in which he presides, on two successive new trial motions, to investigate the whole of the documentary evidence and the confirmatory proofs, and to formulate conclusions which were unanimously adopted by his learned colleagues, and in whose reported judgment he has demonstrated his complete mastery of the law and the facts which have been so laboriously discussed before your Lordships.

As I have indicated, I cannot entirely concur with all the views adopted by Mr. Justice Lawson, and I might possibly have desired the modification in some respects of the vigorous language in which they were conveyed; but I am unable to hold that the legal evidence on which the jury have pronounced, and on which it was their special province and duty to decide, was insufficient to sustain their verdict.

I therefore agree with the Lord Chancellor that this appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, the present action was commenced on the 27th of November 1875. There were three counts: (1.) That the defendants broke and entered the several fishery of the plaintiff in the River Blackwater, and in that portion of the said river and in that part of the lands of Ballyphilip East, on the west side of the river, which lies opposite to the lands of Glenassy, otherwise Cooneen, and disturbed the fish therein. (2.) That the defendants broke and entered the several fishery of the plaintiff in the river

Blackwater, and in that portion of the said river which extends from the west bank of the said river to the middle line thereof, so far as the river holds its course along and opposite to that part of the lands of Ballyphilip East on the west side of the river which lies opposite to the lands of Dromore on the east side of the river and disturbed the fish therein. (3.) That the defendants broke and entered certain lands covered with water, called the River Blackwater, being the bed and channel of the said river, and with a certain net called a drift net disturbed and took and carried away the soil of the said bed and channel.

The defences were separate denials that the defendants had committed the acts in the three counts alleged; separate denials that the fisheries in the first and second counts mentioned were the plaintiff's several fisheries, or the fish therein his fish (there was no denial that the lands in the third count were the lands of the plaintiff); allegation that the river at the places mentioned was a public navigable river, in which the public had the right of fishing, and that the defendants in the exercise of this right justified the trespasses. The replications set up that the plaintiff and his ancestors, from time before legal memory, had and still have the right of several fishery claimed, and that the fishery was put in defence before legal memory. And on these allegations eleven issues were sent for trial.

On the last trial, before Mr. Justice Lawson in February 1878, a verdict was found for the plaintiff on each of these eleven issues. A new trial was moved for, the certificate stating the grounds occupying twenty pages of print in the appendix, from page 636 to page 656. The grounds of the application all resolve themselves into these: misdirection, improper reception of evidence, improper rejection of evidence, and that the verdict was against the weight of evidence. And before proceeding further it may be as well to remind your Lordships that the Supreme Court of Judicature Act (Ireland), 1877, by the 61st section provides that the rules in the schedule thereto are to come into operation immediately on the commencement of the Act, that is the 1st of January 1878, which was before this trial, and that the Rule 32 in that schedule is, "A new trial shall not be granted on the ground of misdirection or of the improper admission or

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rejection of evidence, unless in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to such other part only;" a very salutary provision, which in my opinion renders it unnecessary to consider many of the objections raised in the certificate and discussed by the counsel for the appellants at your Lordships' bar. There were, however, some objections of a substantial character, such as, if they were well founded, would have shewn matters which would have occasioned a "substantial wrong or miscarriage."

The Exchequer Division unanimously discharged the order. The majority of the Court of Appeal, consisting of the Lord Chancellor and the Master of the Rolls, affirmed their order, the Chief Justice May dissenting, for some reasons which have to be considered carefully.

On the argument at the bar of this House the counsel for the appellants, at very great length, went through not only the objections which had the sanction of the Chief Justice, but many others, and at the close of the arguments it was thought proper to consider on which objections it was desirable to hear further argument.

The cause had before been tried before Palles C.B. when the plaintiff obtained a verdict, on evidence mainly, but not in all respects, the same as that brought before the judge and jury at the trial in 1878. A new trial was then granted by the Court of Exchequer, because some documents tendered as evidence were improperly received. None of these have been tendered in evidence on this trial. A very learned and elaborate judgment was pronounced by Palles C.B. on the granting of the new trial, (reported in *Duke of Devonshire* v. *Neill* (1),) in which he gave his opinion, which was adopted by the unanimous Court of Exchequer, on many of the points on which the evidence which had been objected to on that trial was again objected to on this trial, and on the question whether there was

(1) Ir. Rep. 2 Q. B., C. P. & Ex. Div. 132.

any misdirection by the Chief Baron. Those rulings were binding on Lawson J. at the new trial, and he did adopt them, so far as they bore on the case and evidence as brought before him. They were not binding on the Court of Appeal, nor of course on this House, but they are weighty authorities, and have afforded very great assistance in considering the points which arise.

And now, after this preamble, I proceed to consider what objections were made by the appellants' counsel during this long proceeding, and to say on which of them this House did not desire the assistance of the respondent's counsel.

The whole history and nature of the case is very ably and fully stated in the judgment of the Master of the Rolls (printed in the Appendix, page 1100), necessarily at great length, and I think, with great accuracy. I shall only state so much of it as is necessary to explain what I think it necessary myself to say.

The River Blackwater flows past Lismore to Cappoquin, and thence to the sea at Youghal. The tide ebbs and flows in the estuary for between twenty and thirty miles above Youghal. The ebb and flow of the tide terminate some miles below Lismore and some miles above a point called Comaun-Kildroneigh. The parties are not agreed upon the precise position of this place, but it is agreed that it is several miles further from the sea than the places in which the trespasses are laid. And it is admitted that the plaintiff has a several fishery called the Bishop's fishery in the tidal part of the Blackwater down to Comaun-Kildroneigh. No misreception, if there was any, of evidence tending only to prove this admitted several fishery could occasion any substantial wrong or miscarriage, and we may at once pass by all such evidence.

Nearer the sea, on the west side of the tidal river, lie lands, including the manor of Strancally, which comprises the places in which the trespasses are laid. These lands were part of the estate of Sir Walter Raleigh, and had since his forfeiture in 1602 been owned by the Boyle family, afterwards Earls of Cork, until about 1738. One point which will have to be dealt with later is, whether it was misdirection in the learned judge to hold that there was no evidence that the right to the fishery at the places in which the trespasses were laid, if it had belonged to the Earls of Cork, had been conveyed away at or after 1738. On the

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opposite or east side of the tidal river, for several miles, lay the lands of Dromana, which at the time when Raleigh owned Strancally and the western bank, were the estate of Sir John Fitzgerald, and had descended through a succession of heiresses to Lord Stuart of Decies. Nearer the sea still lie other lands and the town of Youghal.

The form of the pleadings put in issue no more than the rights in the places in which the trespasses were laid; but the substantial case of the plaintiff was that from time before legal memory the fisheries in the whole of this tidal river had been appropriated, and that along this long stretch of the river lying between Strancally and Dromana, which one may call the middle stretch, the exclusive right to fish had become vested on the one side of the middle of the river, along with the soil and freehold of the bed of the river, in the plaintiff and the Boyles, his ancestors, and on the other in Lord Stuart and the Fitzgeralds and Villiers, his ancestors; and that though in some places rights of fishing in particular places might have become vested in particular persons (under whom the defendants did not justify), the right to fish had never since the time of legal memory been in the public. The right of fishery and in the soil in the tidal river below this reach was not directly in controversy.

And as the facts may conveniently be divided as they regard these three stretches of the river, so I think it convenient to divide the evidence into what may be called the paper evidence of title, the evidence, that is, of documents tendered to shew, and in the opinion of the Judge shewing, ancient possession as of right of the exclusive fishery, such as to raise a proper presumption for the jury that the exclusive right had been appropriated before the time of legal memory, so as to give a prescriptive right to exclude the public from fishing there; and the evidence of modern user and non-user which might fortify or rebut that presumption.

Before examining this evidence, it may be convenient to make a few remarks on the general law as to the rights of fishing in arms of the sea, or what is the same thing, rivers where the tide ebbs and flows. I do not think that there is now any room for controversy as to what is the general law.

Lord Hale, in De Jure Maris, Pars Prima, c. 4 (I cite from

Hargrave's Law Tracts, Dublin ed. 1787), says at p. 11:—"The right of fishing in this sea" (i.e. the narrow seas adjoining the coasts) "and the creeks and arms thereof, is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . . But though the king is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it unless in such places creeks or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty." He then proceeds to say, at p. 12, "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; so that the River of Thames above Kingston, and the river of Severn above Tewkesbury, &c., though they are public rivers, yet are not arms of the sea. But it seems that although the water be fresh at high water, yet the denomination of an arm of the sea continues if it flow and reflow as in Thames above the bridge."

Lord Hale, in De Jure Maris, Pars Prima, c. 5 (Hargrave's Law Tracts, p. 17), says:—"Although the king hath, primâ facie, this right in the arms and creeks of the sea, communi jure, and in common presumption, yet a subject may have such a right; and this he may have two ways, first, by the king's charter or grant, and this is without question. The king may grant fishing within a creek of the sea, or in some known precinct that hath known bounds, though within the main sea." This is expressed in the present tense, as if Lord Hale thought that the prerogative of the Crown still existed; and indeed one (though only one) of the grants which he cites, that of King John to the Abbot of Beaulieu, is after the time of legal memory. And there seems to me, if it were res integra, considerable doubt whether the 16th chapter of Magna Charta did more than restrain the writ de defensione ripariæ whereby when the king was about to come into a county all persons might be forbidden from approaching the

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banks of the rivers, whether tidal or not, that the king might have his pleasure in fowling and fishing therein, a prerogative very analogous to the forest rights (see the writ, Hargrave's Law Tracts, p. 7). But in *Malcolmson* v. *O'Dea* (1) it was laid down that since Magna Charta no new exclusive fishery could be created by royal grant, though all fisheries were left untouched which were made several to the exclusion of the public not later than the time of legal memory, that is, the reign of Henry II. This must, I think, be held to settle what the law now is, and we must, therefore, qualify what I have just quoted by adding, "if either the grant was itself before legal memory, that is, in or before the time of Henry II., or if there is evidence sufficient to prove that the Crown had acquired an exclusive propriety before legal memory."

Lord Hale then proceeds, at p. 18: "The second right is that which is acquired or acquirable to a subject by custom or prescription, and I think it very clear that the subject may by custom and usage or prescription have the true propriety and interest of many of those several maritime interests which we have before stated to be primâ facie belonging to the king. I will go over them particularly, and set down which of these interests are acquirable by usage or prescription by a subject. A subject may by prescription have the interest of fishing in an arm of the sea, in a creek or port of the sea, or in a certain precinct or extent lying within the sea, and these not only free fishing but several fishing. Fishing may be of two kinds ordinarily, namely, the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil or interest or propriety of it, or otherwise it is a local fishing that ariseth by and from the propriety of the soil. Such are gurgites, weirs, fishing-places, borachiæ, stachiæ, &c., which are the very soil itself, and so frequently agreed in our books. And such as these a subject may have, by usage, either in gross, as many religious houses had, or as parcel of or appendant to their manors, as both corporations and others have had, and this not only in navigable rivers and arms of the sea but in creeks, and ports, and havens; yea, and in certain known limits in the open sea contiguous to

(1) 10 H. L. C. 618.

the shore. And these kinds of fishing are not only for small sea fish, as herrings, sprats, pilchers, &c., but for great fish, as salmons, which though they are great fish are not royal fish, as the report of Sir John Davies in the case of the fishing of the Bann would intimate. And not only for smaller fish and salmons, but even royal fish, as whale, sturgeon, porpoise, which though they are royal fish, and primâ facie and of common right do belong to the king, yet a subject may prescribe even for these as appurtenant to his manor, as is unquestionably agreed by our books."

He then cites many precedents in support of his opinion, and adds, "Infinite more of this kind might be produced. I shall add no more here, but in the subsequent parts of this and the next chapter some other instances of this nature will occur which be applicable to the prescription of the right of fishing in navigable rivers; and I have added the more because there are certain glances and intimations in the case of the piscary of the Bann in Sir John Davies's reports, as if the fishing in these kinds of royal rivers were not acquirable but by special charter, which is certainly untrue, for they are acquirable by prescription or usage, as well as royal fish may be."

This long extract is in all its parts confirmed by the decision of this House in *Malcolmson* v. *O'Dea* (1), unless it was Lord Hale's opinion that a Crown grant subsequent to Magna Charta could take away the public right of fishing if then existing. That is I think now conclusively settled not to be so. I have read this extract because it seems to me to shew that the substantial question at this trial was, whether there was such evidence as ought to lead to the conclusion that before the time of legal memory, that is to say, in the time of Henry II., either the king or some particular subject had, in the language of Lord Hale, gained a propriety exclusive of the common liberty of fishing in this part of the river, though the tide there ebbed and flowed. It was argued that as the exclusive fishing, if it was shewn to have existed, had come back into the possession of the Crown by forfeiture, it would merge and cease to exist. No reason was suggested why, if the king could himself acquire this right before Magna Charta, and continue to hold it afterwards, he should not

(1) 10 H. L. C. 593.

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be capable of holding it afterwards if it came back to him, and no authority was cited to that effect. I completely adopt as my own what was said in this case by the Master of the Rolls. "It is not law, and this can never be too often repeated, that the Crown cannot grant a several fishery in tidal waters since Magna Charta. Such a statement is illusory and contrary to law. It can grant a several fishery in such waters since Magna Charta, if that fishery existed before Magna Charta. If a tidal river in which there was *primâ facie* a right in the public to fish was appropriated by an individual or by the Crown before Magna Charta, that individual or the Crown, if the Crown has got it back, can grant it after Magna Charta. That is a settled principle on which everyone of the cases connected with several fisheries in tidal rivers have been adjudicated upon in this country; and inasmuch as it is not possible in any given case that evidence could be brought forward in a Court of justice as to what happened with respect to a river before Magna Charta, if the Crown's patent purports to grant a several fishery, and the grant is followed by user of it as such—I mean, by sufficient user—that is always and will ever be held sufficient evidence that the fishery existed before Magna Charta." I certainly did not, nor did your Lordships, require further argument from the respondent's counsel before pronouncing that there was no such merger.

Willes J., in the opinion which he delivered for the judges in the case of *Malcolmson* v. *O'Dea* (1), says, "If evidence be given of long enjoyment of a fishery to the exclusion of others of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to shew that its origin was modern; the result is, not that you say this is a usurpation, for it is not traced back to the time of Henry II., but that you presume that the fishery being reasonably shewn to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory." He adds, speaking of the fishery in the Shannon, "There is no improbability in the early appropriation of this always valuable property, or even a more extensive

(1) 10 H. L. C. 618.

fishery, either in the time of the Irish princes or in that of the Ostmen, who in this and other parts displaced the ancient inhabitants, and who no doubt gave the name of Lax wear (Leax waer or Lachs wehr) to the chief accessory of the fishery, or by Henry II. in his grant to the companion of Strongbow."

I think myself, as a matter of antiquarian speculation, that it is more probable that the Bishop's fishery, which it was admitted had existed from before the time of legal memory, was enjoyed by the ancient ecclesiastical corporation of Lismore, before the English acquired any sovereignty; and, after that sovereignty was acquired, continued to be enjoyed by that ecclesiastical corporation as of right, without any disturbance during the residue of the reign of Henry II., which would give a title by prescription without any fresh grant from the Crown. But it is immaterial whether there was a prescriptive title only, or a grant from the Crown, or both, if there was such evidence as would prove such an ancient enjoyment as would justify the presumption that the exclusive fishery originated, whether in the Crown or in a subject, before the time of legal memory; and that evidence, together with all that was in evidence which tended the other way, was properly left to the jury. And these are the two questions on which what I may call the merits of this controversy depend. Before dealing with them I wish to dispose of some points on which this House did not require any argument from the respondent's counsel.

It is clearly proved that at the time when the Earl of Desmond and his followers were attainted, that is in 1585, nearly three centuries since, the lands on the upper part of the river Blackwater, above where the tide flowed, and the lands on both sides and the fishery down to the point called Comaun-Kildroneigh, belonged to the Bishop, Dean, and Chapter of Lismore, and were conveyed by the Bishop, Dean, and Chapter to Sir Walter Raleigh.

The property on the west bank of the river (with the exception of a manor of Temple Michael), including the manor of Strangcally, down to where the possessions of the dissolved monastery of Masallan began, which was far below the places which, &c., belonged to the Earl of Desmond and others who were attainted

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along with him; the lands on the east side of the river from Dromana downwards, and the manor of Temple Michael on the west side of the river, belonged, at that time, to Sir John Fitzgerald, who was not attainted. It was a matter depending on the evidence what fisheries were included in the possessions of these forfeited persons, and of the monastery of Molanassa which had come to the Crown; and of Sir John Fitzgerald, which was not forfeited at all, and whose possessions never came into the hands of the Crown at all. But what was granted to Raleigh by Queen Elizabeth, including the forfeited lands on the west bank of the river, and the possessions of the dissolved monastery of Masallan, and that which he had purchased from the Bishop, Dean, and Chapter of Lismore, were, on the 7th of December, 1602, a very short time before his attainder, conveyed by him to Sir Richard Boyle. Probably the validity of this conveyance was questioned, or at least questionable on behalf of the Crown, and Sir Richard Boyle prudently obtained a series of grants from James I. and Charles I., under the Commissioners for defective titles, confirming his title. These were dated in 1604, 1609, 1613, and 1630, all much more than sixty years ago.

It was argued that these Crown grants were defective, and might have been avoided by the Crown for different reasons, such as that they were not properly enrolled, and that the Crown was deceived in its grant; and that the Crown by its prerogative being incapable of laches, the Crown grant, if voidable, was void, and the Crown was in possession; and that a stranger not claiming under the Crown, and who was a trespasser either against the Crown or against the Crown's grantee, might set up this possession of the Crown as a bar to an action by one in actual possession. However this might have been before the Nullum Tempus Act, Ireland, 48 Geo. 3, c. 47, or however it might, at the present day, be as to Crown grants of things not within that Act, I think that now, after sixty years' enjoyment of lands and hereditaments such as those claimed by the plaintiff in this action, it is clear that the Crown could not disturb the title on such grounds as these, and it would require very strong authority to shew that a stranger could set up the jus tertii in the Crown after the Crown could no longer set it up for itself. Your Lordships did not, therefore, require to

hear any argument from the counsel for the respondent on these objections, and I think it clear that whatever title to those fisheries and to the bed of the river had vested in the Crown before these patents, is now vested in the representatives of the Crown grantees.

There were given in evidence early grants by King John to Thomas Fitz-Antony, and by Edward I. to John Fitz-Thomas, the ancestors, or supposed ancestors, of the Earls of Desmond, and a curious treaty of peace between an old Earl of Desmond and his grandson and heir on the one part, and John Fitzgerald, son of the Earl, who is supposed to be, and probably enough was, the ancestor of Sir John Fitzgerald of Dromana.

It was said by the counsel for the appellants that these documents were irrelevant; and Lord Chief Justice May says that he does not think the last shews what the title of the Decies family was. I do not inquire into this, for I think that whether the Earl of Desmond and his adherents, who were attainted, and Sir John Fitzgerald who was not attainted, were, three hundred years ago, in possession of their lands by this title, or by some other title not now proved; or, as I think is quite as likely, were descended from persons who originally got possession by the strong hand as disseisors, so that their title depended on descents cast, and lapse of time, is quite immaterial, if at that early time, now three hundred years since, the possession was enjoyed as of right exclusive of the public, so as to raise the presumption that the several fisheries there were prescriptive.

Mr. Justice Lawson in his charge does not leave anything to the jury depending on these documents; and even if they were improperly received in evidence, which I by no means say, there does not seem to me any ground for saying that this reception occasioned substantial wrong or miscarriage.

The inquisitions and surveys on the attainders of Desmond and his followers, and of Raleigh, were evidence that several fisheries at different places, and particularly at Strancally, were in the possession of the attainted persons at that early period. And the patents to the Boyle family, as I have already said, are such as to convey to the plaintiff's ancestors all that the Crown had to grant, and they were such as to profess to grant to Sir Richard Boyle,

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as early as 1609, the whole fishery in the whole river of Blackwater as far as the tide ebbed and flowed, and the whole of the soil of the bed of the river there; thus giving a paper title to Sir Richard Boyle, if it was accompanied and followed by sufficient proof of possession. I say nothing as yet as to the complaints made as to the way in which Mr. Justice Lawson left the questions arising on this to the jury. I confine myself to saying what was the evidence.

The inquisition after the death of Sir John Fitzgerald in 1620 (Appendix 203) affords evidence that he was seised of a great deal of land and of many fisheries on the east side of this middle reach opposite to Strancally. The grants to Sir Richard Boyle purported to convey these to him. If, however, they were already the property of Sir John Fitzgerald, that grant was ineffectual to convey what was not the Crown's to grant. Sir Richard, now become Lord Boyle, attended at the inquisition and put in his claim.

The inquisition on the death of John Oge Fitzgerald in 1627 (Appendix 215), and that on the death of Gerald Fitzgerald in 1643 (Appendix 288) afford evidence that the Fitzgeralds continued in possession, and that Lord Boyle, now become Earl of Cork, continued to assert his claim. And then, some years later, arose a controversy between the then Earl of Cork and Mr. Villiers, who had married the heiress of Dromana, and his wife, ending in a decree of the Court of Chancery.

Mr. Justice Lawson received and left to the jury the decree in the Court of Chancery of the 6th of May, 1687 (Appendix, 331), as evidence, and as he put it, extremely strong evidence, that, about 200 years ago, the Earl of Cork and Mr. Villiers in right of his wife, the heiress of Fitzgerald of Dromana, were between them in possession, to the exclusion of the public, each of one moiety of the exclusive right of fishing along this reach of the river between Strancally and Dromana, including in it the places in which the trespasses were laid. At the first trial before Chief Baron Palles, only the minutes of the decree were produced, and he received them as secondary evidence of the decree; and in the judgment in *Duke of Devonshire* v. *Neill* (1) the question whether and to what extent the decree

(1) Ir. Rep. 2 Q. B., C. P. & Ex. Div. 152.

itself would have been evidence was discussed. Mr. Justice Lawson followed the decision of the Exchequer, and now the first point of real substance is whether he was right in doing so. If he was not right the improper reception of this evidence produced substantial miscarriage on the trial of the action: for I cannot doubt that the verdict was very much influenced by this evidence.

The Chief Justice May (Appendix, 810) seems to express an opinion that the proceedings were admissible, but that little weight should be attached to them. In this I cannot agree; I am of the opinion expressed by the Master of the Rolls when he says:—"That decree has been objected to, and all the proceedings that lead to it; and with respect to the admissibility of these documents as evidence, I shall come to that by and by. But if it be evidence, it is the clearest proof that the Earl of Cork had then some exclusive possession on his side of the river for at least three years before he filed this bill, and that the Villiers family had possession of the weirs at Dromanamore and Dromanabeg, and the salmon fishing to the centre of the stream for at least three years before they filed their bill. Because it will be found from the nature of this possessory bill that the Court of Chancery has alone jurisdiction in, and can only deal with such a suit on continuous, unbroken, clear, and unequivocal user and possession being shewn for three years before the filing of the bill, as is explained by Lord St. Leonards in *Hemphill* v. *M'Kenna* (1). Proceedings in a Court of Justice which are final, or quasi-final in their character, whether they be judgments in a Court of law, or decrees in a Court of Equity, even in those remote times, if those proceedings were regularly conducted and there was no pretence for collusion, are entitled to great weight."

The question whether evidence such as this was admissible is one of general importance. It had been well considered in the Courts below, both in the Court of Exchequer, and by the Court of Appeal, but your Lordships thought it right to hear further arguments on it before deciding it.

My reasons for thinking it admissible are that, though the general rule of the law of evidence is to exclude hearsay evidence,

(1) 3 D. & War. 183.

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yet where the point to be proved is ancient possession before the time of living memory there is a wide class of exceptions, grounded on this; that there being no possibility of producing living witnesses to testify as to things that happened so long ago, the matter must remain unproved, unless the best evidence which, from the nature of the thing, can be produced, be received. And where the question is one of public interest, which the question whether the public were entitled to fish in a tidal river or were excluded from it clearly is, evidence of reputation is admissible. The evidence afforded by a record shewing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts, and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts and the usage at that time were as there pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is admissible, at least in cases where reputation would be admissible. Those authorities are cited in *Duke of Devonshire* v. *Neill* (1).

The Exchequer Division on the motion for a new trial adhered to their former opinion, and on appeal the Lord Chancellor and the Master of the Rolls were of the same opinion. Chief Justice May, if I rightly decipher the imperfectly printed part of his judgment (Appendix, 810), thought that inasmuch as this decree did not finally determine the rights of the parties, but left them at liberty "to take their remedy at law, each against the other, for ascertaining their titles as they shall be advised," it was only an interlocutory order, and, like the interlocutory proceedings in *Pim* v. *Curell* (2), proved at most only that each party made a claim at that time, the Court reserving for itself to decide at a future time what the state of things was, which decision was in *Pim* v. *Curell* (2) never come to. But I think this is founded on a misapprehension of the nature of the proceedings before the Court of Chancery. The Lord Chancellor never could have pronounced the decree he did had he not been satisfied on the evidence that the public were, and had been for a considerable time, excluded from the fishery on this reach. Any one of the parties before him was competent to raise his claim as a member

(1) Ir. Rep. 2 Q. B., C. P. & Ex. Div. 152. (2) 6 M. & W. 234.

of the public; and any one not before him might have applied, and would have been permitted to prove if he could, that both litigants were usurpers, claiming that to which neither had a right; and unless the whole proceedings are a fiction, it is impossible to doubt that every one in any way connected with the neighbourhood of the Blackwater must have heard of the struggle between these families, and the cross bills of indictment preferred by each against the dependants of the other. I think, therefore, that this evidence was properly received. It had, of course, to be followed up by proof of antecedent and subsequent user; and evidence was given of acts of ownership by the Villiers family, and a series of acts of ownership, not quite so complete and strong, by the Boyle family. Chief Justice May says, and his observations were repeated and relied on at your Lordships' bar: "I will now make a few remarks on the documents offered as affording proof of enjoyment of a several fishery on the river Blackwater, passing over those connected with the Lismore fishery, which was always admitted, and the title to which is clear. There are leases to Herward, 27th of November, 1607, of Ballyphilip, adjacent to the locus in quo, reserving the fishery of the river and the bed and soil. There is the lease to Strangman of 1627, and to Swayn of 1628, of premises in Ballyphilip, containing a similar reservation. These leases are of very ancient date; they do not purport to confer on the lessee title to any fishery. As to the fishery there was no transmutation of possession in respect of it, no obligations were incurred on the part of landlord or tenant, acts of ownership as to the fishery they were not. At the most they amount to an assertion by the lessor in the presence of the lessee, that the former claimed to be entitled to the fishery in the river. Such an assertion made in respect of a subject-matter of a public right may be admissible in evidence; the weight to be attributed to it is a different question. The leases to Nicholas, 1st of July, 1656, and to Greatrakes, 15th of September, 1665, refer to the Lismore fishery and are not material. Passing over such leases connected with the Lismore fishery, and others dealing with premises in Youghal, or with the bed and soil of the river, it is exceedingly remarkable that the plaintiff has produced no lease executed by him or his predecessors in estate dealing

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directly with and purporting to demise a several fishery in the river Blackwater, from Comawn-Kildroneigh, the termination of the Lismore fishery, down to Youghal, a distance of twenty miles and upwards. With respect to the leases to Christopher Musgrave, 1738 and 1752, upon the true construction of those documents I am clearly of opinion that they demise nothing more than was comprised in the original grant from the Bishop of Lismore to the trustees of Raleigh in 1590, and that the words, the 'salmon weirs and fishery of the river Blackwater,' as contained in these documents, are confined to the limits of the Lismore fishery; and of this opinion was the Court of Exchequer. The agreement binding the lessor to prosecute in case new weirs and nets were placed or used on the river, would apply to new weirs unlawfully erected on the lower river, which would be injurious to the upper fishery, and in respect of which the lessor bound himself to bring actions such as that of *Devonshire* v. *Smith*."

As far as regards the leases to Herward, and to Strangman, and to Swayn, I have looked carefully through the summing-up, and cannot find that any greater effect was given to them than as shewing that these early leases were evidence that the claim by Boyle had been so early made by Boyle and was not invented afterwards. The Chief Justice thinks that they were evidence to that extent; and, even if they were not admissible to that extent, the fact that the claim was early made has been so abundantly proved by other evidence that no miscarriage or substantial wrong could have been occasioned by the reception of these leases.

The leases to the Musgraves were a more important matter, and your Lordships heard the respondent's counsel on it. The counsel for the plaintiff had relied on the trial before Chief Baron Palles, as they did afterwards on that before Mr. Justice Lawson, on the memorandum on the first of these leases, and the covenant in the second, as accounting for the Earls of Cork and Dukes of Devonshire not having during the currency of these leases, which existed from 1738 till the death of the last of the three lives in the second lease, the precise date of which is not given, but which probably was not till well into the nineteenth century, either by their lessees or themselves fished the middle

stretch of the river. Their argument, and it was a legitimate one to lay before the jury, was that, from the nature and habits of the salmon, the best mode of taking them for purposes of commerce was to allow them to run up to the great weir at Lismore, where they could all be taken, and that the Earls of Cork, in order to work their fishery in this way by their tenants, bound themselves not to allow any new weirs or nets below. They did not engage to put down the old ones, which would have necessitated a revival of their suit against the Dromana family, and probably against others, who, by usurpation, or perhaps by right, were in possession of old brush weirs; but they bound themselves to put down any new ones.

It was essential for this argument that the covenant should extend to the river below the Bishop's fishery, and so Chief Baron Palles had ruled at the trial before him, and so the Exchequer Division held in *Duke of Devonshire* v. *Neill* (1). It was not, I think, very material for this argument whether the demise to Musgrave was so worded as to convey to him the right of fishing below the Bishop's fishery or not, and I think the Exchequer Division did not decide that question either way. The words used in the leases are large enough to bear the meaning put upon them by Mr. Justice Lawson at the trial. Perhaps if the whole facts were known they might be such as to limit the largeness of those words, so that they could be read as the Chief Justice thinks they should be. I am by no means prepared to say that Mr. Justice Lawson was not right in the construction he put upon the demise; but supposing him not to be so, I agree with the Lord Chancellor and the Master of the Rolls that the misconstruction of the demise did not affect the point for which it was used before the jury, and that the misdirection (if it was one) did not occasion any substantial wrong or miscarriage within the meaning of rule 32. I think, therefore, that all the objections to what I may call the paper title fail.

Your Lordships did not think it necessary to hear the respondent's counsel on the question whether there was evidence that the plaintiff was out of possession of the fisheries at the places in which, &c., at the time of the trespasses.

(1) Ir. Rep. 2 Q. B., C. P. & Ex. Div. 132.

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There was ample evidence that he and his ancestors were out of possession of the lands on the shore since 1738, and there was evidence that one old brush weir not at the places in which, &c., was in the possession of one of those who now enjoyed part of the lands on the shore. But no deed of conveyance was produced, and if there was one which comprised the fishery it lay on the defendants to produce it. And unless it could be successfully maintained that evidence that an ancestor of one who has inherited property has conveyed away part of an estate, not including the spot on which a trespass is committed, is evidence in favour of the trespasser that the whole has been conveyed away, to which I cannot agree, the ruling of Mr. Justice Lawson on this point is right.

There remains the important question whether there should be a new trial on the ground that the judge did not properly leave to the jury the evidence of modern user, both that which was in favour of the prescriptive origin of an exclusive fishery, and that more especially of cot-fishing, which had a tendency to prove that there never was an exclusive right of fishery, so that as he left it to the jury the verdict was not satisfactory.

The judge began by stating in very strong terms that the Duke had proved a paper title as clear as ever he heard proved in a court of justice, and one so strong that it would almost entitle the plaintiff to have a verdict directed for him, but for the evidence given on the part of the defendants of the exercise of the right of cot-fishing. He went through the evidence afterwards, and besides at different times telling the jury that the question was whether the fishery in the river had been appropriated to the exclusion of the public, concluded his charge by telling the jury, in answer to a question by the foreman, that the question whether there was a several fishery before Magna Charta was left to them. The counsel for the appellants complained that, though he thus avoided what would have been a misdirection, the verdict obtained by the use of such strong language could not be satisfactory; and some countenance to this objection is given by Chief Justice May, who says (Appendix 814): "Language of this strength was calculated to make a deep impression on a jury; particularly in a case of this nature, where a jury

would probably feel disposed to be guided by the opinion of the presiding judge." I agree that it was. But I think that the judge would have done wrong if he had not let them know what was his opinion on this question, for the very reason that the jury would be, and ought to be, much guided by his opinion, and though his opinion would have lost none of its force by being expressed more mildly, it was, in my opinion, in substance right. Had there been any real question requiring the common sense of the jurors to be applied, there might have been ground for saying that the strength of the language rendered the verdict not satisfactory. As it is, I now see no ground for so holding.

The judge then proceeded to comment on the evidence, and, after pointing out that the patent to Sir Richard Boyle gave him in terms the fishery, says: "Now putting out of view the other royal patents, which I do not at present refer to, the question for you is, had the king power to make that grant? If he had, the title is traced to the duke, and if Sir Richard Boyle got a royal fishery by that grant, no exercise of the right of cot-fishing, or any other fishing, in that river, would deprive him of that fishery. The only use that can be made of it is to furnish an argument that the king could not make such a grant because the river had not been appropriated, but always remained open to the public. That brings us back to the earlier documents to see what light they throw upon this question, viz., whether this river had been appropriated or dealt with before Magna Charta." And after commenting on the documents in a way not objected to, and pointing out that the two religious houses of Lismore and Molanassa had one of them the upper fishery and the other the lower one, he proceeds: "The result therefore, so far as I have gone, is that you have the entire bed and soil of the river conveyed to a subject; you have the upper part of the river down to Comaun-Kildroneigh appropriated, and you have the lower part down to the harbour of Youghal appropriated. Then we come to the middle reach of the river—that is, the one in which the question arises, namely, from where the Bishop's fishery ended to where the other fishery begins—and it certainly would be a very singular thing if it should turn out that the middle portion o the fishery was left unappropriated, and that, while the public

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were excluded from the upper and lower end, they had a public right of fishery in the middle of the river. Well, the important question in this case is, is that so as to the middle reach of this river?"

He then comments at some length on the inquisitions and other documents proving ancient possession, in a manner not now complained of, and on the Chancery proceedings between the Earl of Cork and the Villiers family in a way much complained of, but which, as I have already said, was in my opinion quite right, and then proceeds thus: "You have now to sum up the results to be deduced from these early documents—you have the exclusive title to the bed and soil of the river vested in the Duke of Devonshire; you have the upper part of the river, appropriated by the Bishop and Dean and Chapter of Lismore long before the time of legal memory, and you have the lower part appropriated by the monastery of Molanassa (I am referring to the Desmond title, not to the Boyle title at present). You have one half of the middle part of the river—that called the Strancally reach—you have the middle part of it appropriated to, and belonging to, and owned by the Villiers as the descendants from Desmond; and if that be the case is it possible, is it conceivable, that a public right of fishery could exist in the other half of that Strancally reach, namely, from the medium filum—from the middle part of the river—from the middle channel of the river opposite the Dromana several fishery, extending to the lands of Strancally at the other side? Is it possible—can the wildest imagination suggest—that a public fishery could exist in a place one half of which is a several fishery? Is it possible to have a public fishery ad medium filum in one half with a several fishery in the other half? Now Lord Cork could not dispute the Villiers' title, he never took any proceedings to do so, and it is quite evident he could not, for just as the manor of Dromana had the fishing to the middle of the river, for it was appurtenant to that manor, just as the fishing of the upper part of the river was appurtenant to Lismore manor, and just so the lower part was appurtenant to Molanassa—but to whom did the other part of the fishery belong? Was it outstanding in the public? I think it absurd to suppose it belonged to anything except to the manor of Strancally; to

the owner of Strancally who claimed the entire, and we find under the early inquisitions that the fishery is found extending along the river here three miles in length. If that fishery of the other half of the river was a several fishery appertaining to and belonging to the manor of Strancally, that belonged to some one, and the question is, to whom does it belong? Who is now entitled to that?"

Chief Justice May, I think, has misapprehended the effect of this part of the summing-up. He seems to think that the judge directed the jury as a matter of law that the Villiers' title was proved; that, if he had done so, would have been as objectionable as if he had directed a verdict for the plaintiff. But I think he does no more than sum up the results which he thinks the jury should draw from the evidence which he has just laid before them, and then leave to them as a matter of common sense and probability whether it was likely that there should be this one portion of the river left unappropriated. If the jury thought that it would be singular if in the time of Henry II., or before, all else was appropriated, and this reach left unappropriated, they would more readily give weight to the evidence tending to shew that this also was appropriated. If he had told the jury that it was in point of law impossible that this portion of the river could be left to the public, he was wrong; it certainly could have been so. If he merely left it to them as an improbability, or singular thing if it was, and left that to them as tending to make them give more weight to the evidence in favour of the Duke, he was right. I think that was what he did do, and what the jury must have understood him to do. I do not doubt that it had weight with the jury, but not more weight than I think it ought to have had. As to the cot-fishing, Mr. Justice Lawson, in his report to the Court of Exchequer says, "I told the jury that they were to consider whether the long and uninterrupted and extensive cot-fishing which had been proved was sufficient to outweigh the documentary evidence of title given for the plaintiff."

By documentary evidence I think is meant the evidence of possession before the time of living memory, which could only be proved by documents; and I think this was the right direction,

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and having read through the charge I do not think the jury could be in doubt that it was the direction given to them.

I think I have noticed all the objections made, though in an argument which occupied so many days, and was spread at intervals over four months, it is not easy to be sure of this.

I think that there is no ground for saying that there was any misdirection or misreception of evidence, occasioning substantial wrong or miscarriage. And with every respect for Chief Justice May, I can by no means agree with him in thinking that the verdict was against the weight of evidence, or that the trial was unsatisfactory.

LORD WATSON:—

My Lords, in this intricate and important case I have come to the same conclusions as your Lordships upon all the points arising for decision. Having had an opportunity of considering in print the judgments which have just been delivered, I think it unnecessary to do more than state my concurrence in the views which have been expressed by your Lordships, with this single observation, that in my opinion the Musgrave leases were rightly construed by Mr. Justice Lawson in his charge to the jury.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 14th Nov. 1882.

Solicitors for appellants: *Hodnett & Verlin, Dublin.*

Solicitors for respondent: *Toogood & Ball, and Currey, Holland, & Currey, for Keily & Lloyd, Dublin.*

[HOUSE OF LORDS.]

WILLIAM WAKE AND BERNARD WAKE APPELLANTS; AND JOSEPH HALL AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1883 March 19.

Mine—High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 *Vict. c. xciv.)—Fixtures—Maxim "quicquid plantatur solo solo cedit."*

Miners working under customs established by the High Peak Mining Customs and Mineral Courts Act 1851 (14 & 15 Vict. c. xciv.) lawfully erected machinery and buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance, which would not amount to a destruction, of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to shew that the property in them was intended to be irrevocably annexed to the soil:—

Held, that the maxim "quicquid plantatur solo solo cedit," was not applicable, and that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and were not liable to the surface owners for so doing.

APPEAL from so much of a judgment of the Court of Appeal as dismissed the appellants' appeal (1).

The action was brought by the appellants to recover damages from the respondents in respect of alleged trespasses upon the appellants' land, and for the wrongful destruction and removal by the respondents of buildings on the land, and for other trespasses not now in question. The facts as proved before Lord Coleridge C.J. (without a jury) are set out in the report of the judgment of Lord Selborne L.C. in the Court of Appeal, and in the judgments of Lords Blackburn and FitzGerald in this House. Lord Coleridge gave judgment that the appellants recover damages (inter alia) in respect of buildings pulled down or removed from the land since the 31st of December 1872 *except such buildings covering machinery or which were used with or as parts of such machinery as were pulled down or removed by the*

(1) 7 Q. B. D. 295.

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defendants prior to the 31*st of December* 1874; with a reference as to the amount of damages. The appellants appealed against so much only of that judgment as is printed in italics, but the appeal was dismissed by the Court of Appeal (Lord Selborne L.C. Baggallay and Brett L.JJ. (1).)

Dec. 5, 6, 1882. *Mellor* Q.C. and *C. Gould* for the appellants:—

The question is whether the Court of Appeal was right in affirming that part of Lord Coleridge's judgment against which the present appellants appealed. In the Court of Appeal Lord Coleridge's finding as a fact that the respondents abandoned the mine in 1872 was not questioned, and it must be now assumed as correct. That being so Lord Coleridge and the Court of Appeal were wrong in holding that the respondents after abandoning the mine had the right to remove the buildings now in question. As soon as the respondents had made up their minds to abandon and ceased working, all these buildings became the property of the appellants, and interference with them was a trespass. The respondents could not have removed them even before they abandoned the mine. The customs did not entitle the respondents to erect the buildings and machinery. The only custom applicable is the fifth, and the words "any other mining purposes" mean any purpose similar to those specified, and would not include erecting machinery and buildings. The erections were therefore unlawful and the removal a trespass. The customs say nothing about removal, and a custom to remove would be bad: *Rogers* v. *Brenton* (2); *Blewitt* v. *Tregonning* (3); Bainbridge on Minerals, p. 141. There is no case where such a custom has been held good, and all other alleged customs besides those enumerated in 14 & 15 Vict. c. xciv. are expressly invalidated by s. 16. The customs must be strictly construed: *Wake* v. *Redfearn* (4). There is no authority for the proposition that where there is a grant of minerals with a reservation of the surface buildings may be erected or pulled down. Customs interfering with the rights of others must not be presumed: *Davis* v. *Treharne* (5). But even if the

(1) 7 Q. B. D. 295.
(2) 10 Q. B. 26, 57.
(3) 3 A. & E. 554, 574.
(4) 43 L. T. (N.S.) (Q.B.) 123, 125.
(5) 6 App. Cas. 460.

erection was lawful the removal was a trespass. When erected the buildings became the property of the surface owner; or at latest at the moment of abandoning the mine. The maxim "quicquid plantatur solo solo cedit" applies. See Justin. bk. 2, tit. 1, ss. 29, 30; Broom's Maxims, 4th ed. 387–9. As to the meaning of "surface" see *Allaway* v. *Wagstaff* (1).

Davey Q.C. (*W. Graham* and *E. Moon* with him) for the respondents, was informed that he need not argue the question whether the respondents had the right to erect the machinery and buildings, or whether the removal was within a reasonable time.

The present case is not covered by the maxim, of which the first notice is found in Gaius, bk. 2, pl. 73 (Oxford ed. by Poste): "Præterea id quod in solo nostro ab aliquo ædificatum est quamvis ille suo nomine ædificaverit, jure naturali nostrum fit, quia superficies solo cedit," where the context treats of accretions to soil by floods, an island rising in a river, &c.: Justin. Inst. bk. 2, tit. 1, ss. 29, 30, 31. These buildings and machinery might have been removed by a tenant as against his landlord: notes to *Elwes* v. *Mawe* (2), citing Year Book, 20 Hen. 7, fo. 13, pl. 24, and *Lawton* v. *Lawton* (3). The machinery is removable, and the building (as only accessory to the machinery) also: *Lord Dudley* v. *Lord Warde* (4). The maxim is not universal; it never prevailed except between heir and executor; tenant for life and remainderman; tenant for years and reversioner; and even then subject to the exception of trade fixtures, and things fixed only for ornament. The true test (apart from authority) is for whose benefit did the miner erect? If there be any presumption that it was for the benefit of the owner the admissions rebut it conclusively. The maxim works injustice and should not be extended to new circumstances.

Mellor Q.C. in reply, referred to *Whitehead* v. *Bennet* (5), and Bac. Abr. tit. Waste H, as to action of waste against a tenant in dower and tenant by the curtesy.

(1) 29 L. J. (Ex.) 51, 58.
(2) 2 Sm. L. C. 8th ed. p. 193.
(3) 3 Atk. 13.
(4) Amb. 113.
(5) 27 L. J. (Ch.) 474.

H. L. (E.) The House took time for consideration.

1883

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1883. March 19. LORD BLACKBURN:—

My Lords, the question to be decided in this case is whether the respondents (defendants below) who were miners, working a lead mine in the King's Field, part of the possessions of the Duchy of Lancaster, and who had erected some buildings on land the property of the appellants (plaintiffs below), were justified as against the plaintiffs in pulling down those buildings and removing the materials at the time and in the manner in which they did remove them. I think it convenient first to say what the question really raised is, and what appear to me to be the facts.

There were ancient mining customs in this district, but by the 14 & 15 Vict. c. xciv., after reciting that the "mineral laws and customs of the King's Field are uncertain and undefined, and are in many respects inapplicable to the present mining operations within the King's Field," and that it was advisable "that the said mineral laws and customs should be revised, altered, and amended, so as to be made applicable to the present state of mining operations within the said Hundred," it is enacted by the 16th section that the mineral laws and customs of a part of the hundred of High Peak, including the King's Field, "shall be such as are mentioned and comprised in this Act, and no other alleged custom or practice shall be valid."

Power is given by the 56th section to make new and additional customs, but that does not appear to have been yet exercised. The articles and customs by this Act established are contained in the first schedule to it, and whether the customs there mentioned were really ancient or not, and whether they were such as would before the passing of this Act have been held reasonable or not, I think that, since the passing of that Act, August 1851, they have the force of statute law.

The first custom allows any one to search for veins of lead ore upon any lands, except those occupied for certain specified purposes, and if a vein is found to follow it under such excepted places. No compensation is given to the owner of the land in which the vein is found and worked, though compensation is

given to the owner of the excepted places for any damage to the excepted places by following it under them.

The 4th, 5th, and 19th customs, set out in the schedule, seem to me material, and I will now read them: "4. The barmaster, together with two of the grand jury, shall provide the miners a way, either for foot passengers or carts, as may be required, from the nearest highway to the mine, and also from the mine to the nearest running stream, spring, or natural pond of water, such ways to be set out in as short a course as may be practicable and reasonable. No compensation is to be claimed by the occupier or landowner for such ways, but such ways are not to be considered public, and the use thereof is to be limited to persons and purposes connected with the mine, and all rights of way are to cease when the mine shall be no longer worked. The parties entitled to use the way may make sufficient ways for use, and keep the same in repair, and may also use for mining purposes the water from the nearest running stream, spring, or natural pond. 5. Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them, for the purpose of laying rubbish, dressing his ore, briddling, making meers or ponds, and conveying water thereto, and any other mining purposes. The miner shall in all cases, before he commences any search or uses any land, make fences sufficient for the protection of cattle from any injury which might arise from his operations, and keep such fences in sufficient repair. 19. The barmaster, if he finds any mine or vein neglected and not wrought, and not hindered by water or for want of air, shall, if required so to do by any person or persons, send to the owner or reputed owner, where known to him, and if not known to him, then put up in some conspicuous place within the liberty in which the mine or vein is situate, a notice that such mine or vein will, at the expiration of three weeks, if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them, be forfeited, and if at the expiration of the said three weeks the mine or vein is not so worked, the barmaster, in the presence of two of the

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grand jury, may give such mine or vein to any person or persons willing to work the same; provided that nothing herein contained shall authorize the barmaster to give away such mine or vein if the owner thereof be unable to work the same by reason of such mine or vein being under water, or for want of air, so long as the owner thereof is using efficient and diligent means to the satisfaction of the barmaster and grand jury to relieve such mine or vein."

I do not think any others of the customs material. Admissions between the parties were made, of which some are material as shewing what is the question which is now to be decided. I will read those which I think material. "1. Admit that the land in question is within the King's Field. 2. Admit that the defendants have got the mining rights given by the statute and scheduled customs and new and additional customs, articles, rules and orders (if binding on the landowners). 3. Admit that up to June 1872 all buildings on the land in question were erected and used for mining purposes. 4. Admit that in June 1872 the defendants suspended working the mine (except the working of the hillocks in 1878, as hereinafter mentioned), and that the mine in question has remained in the possession of the defendants and registered in their or some of their names in the barmaster's books. 5. Admit that the defendants in 1873 and 1874 pulled down the engine-house, boiler-house, and some other of the buildings in the particulars mentioned, and that they sold the building materials and fixed and unfixed machinery . . . 12 and 13. Admit that part of the hereinbefore-mentioned buildings were built on some part of the hillocks above described, there being some feet of these mineral substances between the foundations and the natural surface of the land, but that part of the said buildings (the chimney and pumping engine-house and bed) were on foundations which were below the natural surface. 14. Admit that the mine in question has been worked for 200 years and upwards, during all which period the defendants or their predecessors in title have been in possession as miners. 15. Admit that the materials of which the hillocks were composed have been raised partly by the defendants and partly by their predecessors. 16. Admit that the before-mentioned buildings, other than the

buildings now converted into stables, were erected in and before 1854. 18. Admit that the land in question was allotted to the plaintiffs or their predecessors in title under the award, dated 1807, made under the Great Hucklow Inclosure Act of 1803 (Act and award to be put in). . . . 19. Admit that it has been the practice in the district for miners to erect buildings and fix machinery similar to the buildings and machinery of the defendants for mining purposes, and from time to time to alter and vary the description and character of the buildings and machinery as improvements have been discovered and introduced, and to remove and sell removable machinery without objection by the owners of the soil. 20. Admit that it has been a common practice in the district for work in the mines to be suspended for many years (during which the mine remains the property of the miner and registered in his name in the barmaster's books until dispossessed under the miner's customs), and for the miners afterwards to resume the working of the mine. 21. Admit that the mines and hillocks in question have not been exhausted and are still a valuable property. 22. Admit that the working of the mine was suspended by the defendants in consequence of its being unremunerative, and that it would cost a considerable sum to put up machinery equivalent to what was removed by the defendants in 1873 and 1874."

There can, I think, be no doubt that the buildings mentioned in the 12th and 13th admissions, at least the chimney, pumping-engine house and bed, were so attached to the soil which belonged to the plaintiffs as to be, whilst they so continued attached, part of that soil; and if the defendants can make out that, notwithstanding this annexation, they retained such a property, or at least an interest in the materials of which these buildings were formed, as to be entitled to remove them when they did, the plaintiffs cannot make any case as to anything else. If the defendants fail as to these, there might come to be a question whether they necessarily failed as to other things. But I think, therein agreeing with the Court below, that the defendants have succeeded in shewing that they had such a property, or at least interest in these materials.

The plaintiffs' counsel contended at your Lordships' bar (though

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the Lord Chancellor seems to have understood them not to dispute it below (1)), that the defendants were not justified in erecting buildings of such a nature. And this, if it could have been made out, would have been of great importance to them. For there is a great difference between the position of a person who wrongfully annexes his materials to the soil of another, and that of a person who does so rightfully. But I think the plaintiffs' counsel failed in establishing this contention. I do not doubt that no such buildings were used for mining purposes in the reign of Henry II., when the ancient custom originated; and before the Act of 1851, it might have admitted of an argument whether the custom which, *tempore* Henry II., applied to the erections then necessary or proper, applied now to those which became afterwards necessary or proper. But I do not think it admits of doubt that the Act of 1851 makes the custom apply to the present state of mining operations in the King's Field; and after the 19th admission, it is impossible to doubt that, in the present state of mining, such buildings are necessary or at least proper for mining operations.

It was also contended that, whether the miner could or could not remove the materials whilst his interest continued, that interest terminated in 1872. But that I think fails in fact, for I think, as was indeed decided in the cross appeal which has not been brought before this House, that the miner's interest did not cease merely by the suspension of working in 1872 (though that might have justified the barmaster, under the 19th custom, in declaring the miner's interest forfeited), and that the miner's interest in the portion of the surface of which he had exclusive possession continued till, by the pulling down of the buildings in 1874, he unequivocally shewed that he had abandoned the mine. There is, therefore, no occasion to decide whether or not the right to remove materials, when a person has that right during his interest, continues a reasonable time after the termination of his interest or not.

The question, therefore, which has to be decided is whether when the defendants erected buildings so no doubt as to annex them to the soil of the plaintiffs, but, in the language of the third

(1) 7 Q. B. D. 298, 299.

admission, "for mining purposes," and that at a time when the defendants had a right to erect such buildings on the plaintiffs' soil, they, whatever their intention might be, made the materials the property of the owners of the soil in such a sense that the defendants could not at any time remove them. No case, it is admitted, has ever been decided on this particular kind of interest. The plaintiffs' counsel relied on what is said in a work no doubt of very high authority, the notes to *Elwes* v. *Mawe* (1), that the general rule is, "that whatever is annexed to the realty becomes part of it," which I think is perfectly accurate, "and the person who was the owner of it when a chattel loses his property in it, which immediately vests in the owner of the soil. Quicquid plantatur solo, solo cedit," which I venture to think is much too broadly stated even as the general rule. The maxim cited is to be found in the works of Gaius, and probably he was quoting an older maxim. And the passage in which he uses it is incorporated in the Digest, book 41, title I., "De acquirendo rerum dominio." In the 7th section of that title there is a great deal of very able reasoning as to what should be the law as to property where one person has changed the nature of the thing belonging to another, by bestowing his labour on it, as for instance where one has turned the silver of another into a vase, his block of marble into a statue, or his grapes into wine. That question is not material here; and then in the 10th law of that 7th section it is said (I translate the Latin), "If one on his own land has erected a building with materials belonging to another, he is the owner (dominus) of the building, for all that is built into the soil becomes part of it, 'quia omne quod inædificatur solo cedit.' But this is not so that he who was the owner of the materials ceases to be the owner thereof; but, nevertheless, he (the owner of the materials) cannot bring an action to recover them in specie, nor take them away himself ('nec vindicare eam potest neque ad exhibendum de ea agere'), because of that law of the twelve tables, which provides 'ne quis tignum alienum ædibus suis junctum eximere cogatur sed duplum pro eo præstet.' Therefore if by any cause the building is cast down, the owner of the materials can 'nunc eam vindicare et ad exhibendum agere.'" So far from

(1) 2 Sm. L. C. 7th ed. 185.

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meaning by the maxim that the property which had existed in the materials whilst chattels was lost, and vested in the owner of the soil, the maxim is used when Gaius, and the framers of the Digest who adopted his opinion, thought that the property in the materials remained in the person who was owner of them whilst chattels, and did not vest in the owner of the building, though by the annexation the materials had become part of the soil, and though by the positive law of the twelve tables he was obliged to leave the building untouched on being paid double the value of his materials. And I do not think that the general rule of English law goes so far as is stated in the passage just read from Smith's Leading Cases, or that the authorities cited bear it out. Even where a person himself the owner of the fee has annexed any chattels of his own to his own land, he does not always cause the property in the chattels to cease to be personalty; he generally intends to make them part of the inheritance, and when he does so intend there can be no question that on his death before severance the heir takes, and not the executor.

Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to shew that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord Ellenborough, in *Elwes* v. *Mawe* (1), says that those cases "may be considered as decided mainly on the ground that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty." Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and, as Lord Hardwicke said, in *Lawton* v. *Lawton* (2), "You shall

(1) 2 Sm. L. C. 7th ed. 178. (2) 3 Atk. 15.

not destroy the principal thing by taking away the accessory to it;" and, therefore, as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it may be so great as to prevent the removal. But in the case now before the House there can be no doubt on the admissions that the machinery and the buildings were from the first intended to be accessory to the mining, and that there was not at any time an intention to make them accessory to the soil; and though the foundations being, as is stated in the 12th and 13th admissions, below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to a destruction of the land, or to shew that the property in the materials must have been intended to be irrevocably annexed to the soil.

For these reasons I think that the decision below was right. I therefore move that the judgment below be affirmed, and the appeal dismissed, with costs.

LORD WATSON:—

My Lords, I also have come to the conclusion that the judgment of the Court of Appeal ought not to be disturbed.

I am of opinion that, in sinking into the soil the foundations of a house, chimney, and boiler seat connected with an engine for pumping water from the mine, the respondents were acting within the limits of their customary right. The practice set forth in the 19th article of the admissions made by the parties, on the trial of the cause before Lord Coleridge, must be taken as explanatory of the custom, and is good evidence to shew that the use of the "surface land" for such erections as those in question has, ever since steam power has been employed in pumping, been regarded as a use "for mining purposes," within the meaning of the fifth custom scheduled to the Act of 1851. That is confirmed by the terms of the 26th custom, which obliges the owner of a mine, the working of which is impeded by water, to remunerate any stranger who relieves the mine by means of the old-fashioned steam engine.

I am also of opinion that at the time when the erections in

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dispute were taken down and removed the interest of the respondents in the mine had not come to an end.

It is, therefore, unnecessary to consider what the relative rights of the parties would have been if the erection of these buildings had been in excess of the powers conferred on the respondents by the mineral customs, and if the interest of the respondents in the mine itself had terminated before their removal.

In the Act of 1851, and in the scheduled customs, which are therewith incorporated, and are therefore of statutory authority, the interest of the miner is expressly described and recognised as that of ownership. He has not an absolute right in perpetuity, but his right remains that of an owner until he gives up possession of the mine, or is dispossessed by competent authority. In other words his is a proprietary right derived from the mineral customs of the district, and subject to the limitations imposed by these customs.

Accordingly the position of these parties at the time when the erections in question were made, and also at the time when they were removed, was this:—the appellants were owners of the surface land to which the buildings were affixed,—the respondents were the owners of the mine under an independent customary title, having as an incident of that title the right to erect the buildings for the purposes of their mine. I do not think that between persons so situated the maxim "Quod solo inædificatur solo cedit" has any application.

According to my understanding of the Roman law, from which it is derived, the maxim applied exclusively to two classes of persons; either to those who built in "alieno solo" with their own materials but without title and in malâ fide, or to those who so built in bonâ fide under some misconception as to their right to do so. The malâ fide builder forfeited his structure to the owner of the soil, but, on the other hand, the bonâ fide builder had a right to remove his materials unless the owner of the soil gave him full compensation. I can find nothing in the law of Rome to suggest that the maxim contemplated a case like the present, which involves no question of bona or mala fides, and relates to persons building in "alieno solo" by virtue of a proprietary right superior to and independent of the title of the landowner.

There is, so far as I am aware, no English authority tending to establish that the maxim has ever been regarded in this country as of universal application. The authorities merely shew that the doctrine which it is understood to embody, which is not the same as the doctrine of the Roman jurists, has been given effect to, with certain differences, in the three classes of cases specified by Lord Ellenborough in his judgment in the case of *Elwes* v. *Mawe* (1). I assume that the doctrine would receive a similar application in cases analogous to these, but I can perceive no analogy between the case of independent owners like the appellants and respondents and the cases of a tenant who has no title except a lease from his landlord, or of the division of the estate of a deceased into heritable and movable for the purposes of succession, or of the division of settled estate between the personal representatives of tenants for life or in tail, and the remainderman or reversioner. For these reasons I am of opinion that the appellants must fail; but, apart from them, I am disposed to think that the terms of the statute and customs are conclusive against their claim.

In my opinion all erections made upon or affixed to the solum of the surface land, in virtue of the powers conferred upon the miner by the fifth custom, constitute "mineral property" as defined in the 2nd section of the Act, and as such may be taken in execution and sold, in order to pay debts recovered or penalties awarded against the miner under a judgment of the Barmote Court. These and other provisions of the statute in my opinion plainly recognise the fact that works such as those the appellants claim are, after their erection, owned by the miner—are, in other words, his property subject to his disposal and liable to be taken in execution for his debts. That fact is, I venture to think, of itself sufficient to prevent the application of the maxim to the present case. It appears to me that in all cases arising between the owner of the land in fee and a third party making the erection, the maxim "Quod solo inædificatur solo cedit," if applicable at all, must come into operation at once. An agricultural tenant who builds a barn with its foundations sunk in the soil, ceases the moment the structure is completed to be owner of the

(1) 2 Sm. L. C. 7th ed. 178.

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materials composing it, and his sole interest is thenceforth to occupy as tenant, the building itself having become the property of his landlord.

I have only in conclusion to say that even on the assumption that the appellants had a right to buildings annexed to and accessory to the soil as in a question with the respondents, I agree with the reasoning by which the noble and learned Lord on the woolsack has demonstrated that the buildings in dispute must be regarded as personalty.

LORD BRAMWELL :—

My Lords, in this case the plaintiffs complain that the defendants have taken down buildings fixed to the soil and freehold of the plaintiffs, and have removed the materials. The defendants admit that the buildings were so fixed that they would have been part of the freehold and would have gone with it if, for example, they had been for dwelling purposes and had been erected by a tenant for life. They admit that they pulled down the buildings and removed the materials, contending that they had a right to do so as the buildings were erected by them or their predecessors in title with their own materials, the property in which, say the defendants, has never passed from them. In answer to this the plaintiffs rely on the rule "quicquid solo plantatur solo cedit." The defendants deny that it applies. It undoubtedly applies where such buildings have been erected by a trespasser, a wrongdoer, whether innocently or knowingly so; why it is not necessary to determine. The defendants say they were not wrongdoers. Mr. Mellor faintly contended that they were. This does not seem to have been argued in the Court below, and I think reasonably. For it is impossible to say that the miners might not sink a shaft as they had done, might not have an engine to work the mine, and might not have a building to cover the engine. It seems to me clear that this action cannot be maintained on the ground that the buildings were wrongful.

But the rule "quicquid solo plantatur solo cedit" prevails in another class of cases, viz. that where the builder is not a trespasser; and where the tenant for life or years builds a building

permanently fixed to the soil, he cannot lawfully pull it down as against the reversioner or remainderman. Here again it is not necessary to consider why the law is so nor whether it is reasonable. If it is because the building is a wrong and waste, as has been held, it does not apply to the present case. But further, the relation between such a tenant and the reversioner or remainderman is altogether different to that between the plaintiffs and defendants, if indeed there can be said to be any relation between them. The defendants are tenants or workers of the mine with an easement on the plaintiffs' land. The mine owner, the Duchy of Lancaster, is more in the same relation to the defendants as a reversioner to a tenant than are the plaintiffs. There is no privity between the plaintiffs and the defendants. That the maxim applies where there is, does not shew that it applies where there is not. I know of no other case where it does apply. Without saying that there is no other case, I cannot see why the maxim applies in this. The defendants are not wrongdoers like the trespasser I have supposed. They are not persons who had any estate or term in the land of which the plaintiffs are seised. No doubt the maxim is expressed in general terms and without qualification; but it must be taken with reference to what one would have said were the only cases in which there could be a fixing to the freehold, viz., by a trespasser or by a tenant.

But if no reason can be given why the maxim should apply to this case, plenty of reasons can be given why it should not. The defendants are lawfully in possession of the premises. They or their predecessors lawfully built these buildings, which are essential to the working of the mine, being accessorial to the engine and works; and it would be most unreasonable that they should have to leave them on the premises—as unreasonable as that they should leave the engine. On this ground alone I should advise your Lordships to affirm the judgment.

It is perhaps dangerous, as leading to litigation, to add what I am about to say, but it appears to me that the defendants' case may be made out in another way. I think, if the plaintiffs chose to insist on it, that the defendants were bound to remove these buildings. They have a right to use the surface of the land for mining purposes. But when those purposes are fulfilled, I think

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the miners must restore the surface in a natural state; and it cannot be that the plaintiffs have an option either to have these buildings removed or left at their pleasure.

Further I am of opinion, if it were necessary to decide it, that the principle on which a tenant may remove trade fixtures, would, if the defendants were tenants, justify the removal of these buildings; and that the defendants cannot be in a worse position than such tenants. The claim, if made by any one, should in reason be made by the mine owner, not by the plaintiffs. Suppose the mine is again worked, are new engines and a new house to be put up?

Lastly, it was contended that if the defendants might remove these buildings it must be during the mining. But I am clear that they had a reasonable time afterwards in which to do it; and as I read Lord Coleridge's judgment he has found that it was done within such reasonable time.

I agree, therefore, that this judgment should be affirmed.

LORD FITZGERALD:—

My Lords, this case was most carefully considered in the primary Court, and again in the Court of Appeal, and was fully and ably argued at the bar of your Lordships' House. Your Lordships probably reserved judgment not by reason of any inherent difficulty which the case presented, but on account of its novelty. On mature consideration I had arrived at the same conclusion as that which has been announced by the noble and learned Lord (Lord Blackburn).

The case is one unaffected by authority, and is completely sui generis. I assume that the hard maxim of our law, "quicquid plantatur solo, solo cedit," represents a rigid rule of general application to all cases coming within its ambit, but it seems to me to be obvious that the parties to this litigation, both plaintiffs and defendants, stand outside its limits, and that their rights are not to be determined by its application. They do not come within any of the classes defined by the Lord Chief Justice in *Elwes* v. *Mawe* (1), or deduced by the learned editors of the Leading Cases

(1) 2 Sm. L. C. 8th ed. 185.

from the numerous authorities referred to in the notes to that case.

I do not know that much advantage can be derived from a minute examination of those authorities, or any further endeavour to trace the origin of the maxim to its foundation in the Roman law, or its adoption into the law of England in a more stringent form at a time when little heed was paid to rights other than those of the owners of land. Like all other rules it has received from time to time judicial modifications to suit the exigencies of modern life and modern progress, and numerous exceptions and qualifications have been grafted on it in favour of trade, manufacture, and agriculture, and in furtherance of the rights of creditors. It seems to me that what we have first to do is to ascertain as nearly and as accurately as we can the true relation of the plaintiffs and of the defendants to each other.

The interest which the plaintiffs or their predecessors took in the land allotted to them under the Inclosure Act of 1803 and the award of 1807 was subject to the rights of the Crown as lord of the manor of High Peak, within which the liberty of Great Hucklow is situate, and to the seigniories and royalties incident to such manor, and was also subservient to the customary rights of miners existing from time immemorial and subsequently defined expressly by "The High Peak Mining Customs and Mineral Courts Act, 1851." These customs had probably their origin at a period when the whole ownership of the soil was in the Crown, and were established for the public interests in order to encourage the extraction by mining operations of the greatest quantity of lead from an otherwise unproductive soil, and to add to the revenue of the duchy by increasing the royalties.

Whatever their original foundation may have been, their intrinsic validity cannot now be questioned. It is observable that the waste lands to be divided under the Inclosure Act of 1803 are to be allotted to the parties interested in proportion to their respective properties, rights of common, and other interests in the same, but saving to the Crown and all other persons "all such rights, titles, and interests as they or any of them had in the lands to be allotted before the passing of the Act, or could or might have had in case the same had not been made."

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The mine of the defendants in the place in question had been in possession of and worked by the defendants and their predecessors in title for 200 years prior to and down to 1872, and the plaintiffs took their allotment under the Inclosure Act subject to the rights and interests of the predecessors of the defendants, whatever those rights and interests were.

It does not appear when the buildings in question were erected, save that they had been erected prior to 1854. The erection may have been, and probably was, at a much earlier period, and in substitution for some previously existing buildings, but all were erected for mining purposes, and were similar to those which it has been the practice of the district for miners to erect, and from time to time to vary and alter, "as improvements were discovered and introduced."

I cannot doubt for a moment but that the custom would authorize the miner to use all modern appliances, and that he was not confined to the use of such as existed at the time of the presumed grant of these mining rights.

I now turn to the Act of 1851, but before criticising its provisions I desire to observe that in the course of the arguments on the part of the plaintiffs too narrow a character was given to that Act as one providing only for the interests of miners inter se. The Act goes much further. It declares in its preamble that the Queen, in right of her Duchy of Lancaster, is seised of the Hundred of High Peak, within which there is a district "called the King's Field, otherwise the King's Fee," within which "all the subjects of the realm have from time immemorial had or claimed to have a right to search for, sink, and dig mines or veins of lead ore, subject to certain ancient mineral laws and customs and upon paying certain duties to Her Majesty, &c." It recites that the mineral laws and customs of the King's Field are uncertain and undefined, and in many respects "inapplicable to the present mining operations within the King's Field," and that "it is advisable that the said mineral laws and customs should be revised, altered, and amended so as to be made applicable to the present state of mining operations within the said hundred, and that the jurisdiction of the Great and Small Barmote Courts should be more clearly defined and settled."

The statute then proceeds to provide for the constitution, jurisdiction, and procedure of the High Peak Barmote Courts, and for the appointment of a Steward and other Judges of these Courts, and fixes their duties. The Courts are to be Courts of Record, and have jurisdiction (amongst others) in trial of actions of title, trespass, and debt, and the mineral laws and customs of that part of the hundred over which these Courts have jurisdiction are those mentioned in the Act.

The noble Lord (Lord Blackburn) has referred to many of the articles and customs contained in the schedule to the Act, and I will confine myself to additional observations on them.

The second custom, which authorizes "the landowner to sell and remove from his land the calk, feagh, spar, and other minerals (except lead ore)," limits that right by adding, "when not required for the use of the mine, but not so as to destroy or injure any mineral property."

The sixth scheduled custom provides for the transfer of the miner's interest in his mine by an entry in the barmaster's book. Custom 10 settles the right of the first finder of a vein and the ascertainment of its limits; and from that to the 19th various provisions are made for the settlement of rights and enforcement of them if disputed.

Returning again for a moment to the statute it will be found that in its definitions, sect. 2, the words "mineral property" shall include mines and veins of lead, "and the works, rights, and appurtenances connected therewith, and also lead ore and all tools, materials, goods, chattels, and effects used in searching for, getting, cleansing, or preparing lead ore, whether such tools, &c., be found in or upon any mine or works or elsewhere;" and by sect. 32, when the amount of any judgment recovered in the Barmote Court or any penalty imposed by the Steward shall be unpaid, the Steward shall issue his warrant, and, thereunder, the barmaster is required to take possession of any "mineral property" belonging to the debtor, and shall sell the same by ticket or by public auction to raise the sum mentioned in the warrant.

It will be observed thus that the mineral property liable to be taken in execution for the miner's debt, includes not only tools, materials, goods, chattels, and effects, but also the mine itself

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with its works, rights, and appurtenances. The whole is thus treated as in the nature of personal estate liable to be sold for the miner's debts, and it would not require any strained interpretation to come to the conclusion that under the term "works" would be included machinery and buildings erected for mining purposes and necessary for the working of the mines, and which, according to admission No. 19, it has been the practice in the district for miners to erect, and from time to time to alter and vary as improvements were discovered and introduced.

In endeavouring to trace the relations of the parties to each other, it will be observed that the title of the landowner seems to be largely ignored, and as if subordinated to that of the miner. The landowner is but twice mentioned in the schedule of customs, viz., in the 1st, in giving him a right to the expenses of levelling the land after an unsuccessful search for minerals, and in the 2nd giving him a limited right to remove from his land stuff brought up in the course of mining operation. But, on the other hand, the miner's title seems to be dealt with as superior and predominating; he is entitled to search for, sink, and dig mines in or under all manner of lands of whose inheritance soever they may be; if a mine is found, he is at liberty to work, and makes no manner of compensation or payment to the landowner. So long as his mine shall be worked he shall be entitled without any payment "to the exclusive use of so much *surface land* as shall be thought necessary," &c., for, amongst other purposes, "dressing his ore, making meers or ponds, and conveying water thereto and any other mining purposes." The "exclusive use of the surface land" seems larger than a mere easement over the surface of the land.

The concluding words of custom 5 are very comprehensive, and it seems difficult to hold that the erection of suitable machinery for working the mines, and the necessary buildings for the protection and due use of such machinery, would not come within these words. When once the mine has been found, and so long as it continues to be worked, the title of the miner, not only to the mine, but also to the necessary "surface land," with rights of way and water, seems to be complete and independent of the landowners. He has full power of sale and transfer, or other disposi-

tion, as he may think fit, and until the miner shall cease to work his mine, the landowner's interest in the mine and in the surface land necessary for its working is in abeyance.

On a review of the position of the parties to each other, it will thus be perceived that the defendants did not derive from or under the plaintiffs, and, on the contrary, the plaintiffs took subject to all the customary rights of the defendants, and, amongst others, to the possession and use of the "surface land" for the purposes defined by the statute, and to which the 19th admission is applicable.

The defendants were not tenants or trespassers, and the plaintiffs were not landlords or lessors. There was no manner of contract between them. The defendants had rights, not derived from the plaintiffs' ownership of the surface, but in superiority to it, and to which that ownership was servient; and amongst others the right to erect buildings for mining purposes, and to alter or take them down as might be expedient, and, in my opinion, also to remove the materials.

This is not the case of a novel claim arising out of a new state of circumstances, but is the assertion of an alleged ancient right, springing from unquestioned immemorial customs, declared and established by a modern statute. It does not appear to have ever, before the present occasion, been the subject of controversy or litigation, and when it now comes before us we apply to it the principles of common right and of common justice.

The right of the defendants to remove the fixed machinery, though questioned in argument, has not been raised before us by appeal, and I can see no ground whatever on which so far to doubt or question the decision in the Courts below. Mr. Mellor, however, argued for the plaintiffs that even in that case, and treating the machinery as personalty, and therefore removable, yet that the same rule did not apply to the "building," which being fixed into the land became, by an inexorable rule of law, a part of the land. If the rule was applicable to the present case, there would probably arise the question of intention, whether the erections in question were made for the purpose of benefiting the inheritance in the land or for the more complete use and protection of the machinery as chattels. If such a question could arise

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in the present case, the ordinary presumption would be clearly rebutted. The buildings in question, if not by the statute and customs personalty, were but accessory to the machinery and built to cover and protect it, and the one was as much removable as the other.

In my humble opinion, the machinery and buildings never ceased to be the property of the miners and removable by them, both are treated together as forming mineral property—property of the miners in the nature of personalty, and there seems no pretence for the contention that the right to remove them had been abandoned.

For these reasons I adopt the decision of the Court below, and concur in the opinion that this appeal should be dismissed.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 19th March 1883.

Solicitors for appellants: *Geare & Son.*
Solicitors for respondents: *Flower & Nussey.*

[HOUSE OF LORDS.]

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1883
March 19.

DAVID LYELL . . . . . APPELLANT;

AND

JOHN LAWSON KENNEDY . . . . . RESPONDENT.

Practice—Discovery—Interrogatories—Affidavit of Documents—Ejectment—Action for Recovery of Land.

In an action for the recovery of land the plaintiff is entitled to discovery as to all matters relevant to his own and not to the defendant's case.

In an action for the recovery of land the plaintiff claimed as assignee of co-heiresses of a deceased intestate owner of the land, and the defendant relied on his possession and also set up the Statute of Limitations:—

Held, reversing the decision of the Court of Appeal, that the plaintiff was entitled to interrogate the defendant as to matters relevant to the pedigree and heirship of his assignors and as to alleged admissions by the defendant that his possession of the land was as trustee for the intestate and her heirs, even though the plaintiff might have other means of proving the facts inquired after; and that the defendant must answer the interrogatories in substance, subject to any privilege against particular discovery which he might be entitled to claim.

Held also that the defendant must file a proper affidavit of documents.

APPEAL from two orders of the Court of Appeal (1).

The action was brought in the Chancery Division to recover hereditaments near Manchester and mesne profits. The statement of claim alleged that the plaintiff was assignee by deed of co-heiresses of Ann Duncan, deceased intestate, the owner in fee simple in possession of the hereditaments, and that the defendant had admitted that his possession was only as agent, receiver and trustee for Ann Duncan and her heirs. The statement of defence did not admit the allegations in the claim, and alleged that the defendant had been at the commencement of the action for upwards of twelve years continuously in possession. The plaintiff administered twenty-one interrogatories which, with the documents therein referred to, occupied more than sixty printed pages of the appendix, and of which nineteen related to Ann Duncan's possession and the alleged admissions by the defendant of his

(1) 20 Ch. D. 484.

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possession as agent and trustee for Ann Duncan and her heirs. The 20th and 21st related to the pedigree and descent of the co-heiresses. The defendant partly answered the interrogatories relating to Ann Duncan's possession, and submitted that he was not bound to answer the rest, or any of the others; and as to the 20th and 21st interrogatories alleged that in the course and for the purpose of defending his title in this action he had caused to be made by and through his solicitors various searches and inquiries, being the searches and inquiries referred to and inquired after in the interrogatories, and that the results were in the nature of reports made to him by his confidential agents; and that the books, records, and other places in which and the persons from whom such searches and inquiries were made were equally accessible to the plaintiff as to him; and that the interrogatories were not put bonâ fide for the purposes of this action. In answer to the usual summons the defendant made an affidavit of documents in which he objected to produce the documents in the second part of the first schedule on the ground that they related solely to the defence of his title, and were communications between himself and his solicitors and his counsel in reference to the defence of his title and prepared or procured for the purposes and in contemplation of such defence. The schedule of those documents comprised (inter alia) counterpart agreements for letting a mill on the land in question.

The plaintiff having taken out a summons for a full and sufficient affidavit in answer to each of the interrogatories, and also a summons for production of the documents in the second part of the first schedule, Bacon V.C. dismissed both summonses with costs. On appeal the Court of Appeal (Jessel M.R., Brett, and Holker L.JJ.) affirmed the order of Bacon V.C. on each summons and dismissed the appeals with costs (1).

Feb. 26, 27. *MacClymont* (*Blennerhassett* with him), for the appellant:—

The decision of the Court of Appeal was based upon *Horton* v. *Bott* (2), which decided only that a plaintiff in ejectment cannot

(1) 20 Ch. D. 484.

(2) 2 H. & N. 249; 26 L. J. (Ex.) 267.

3 Jur. N.S. 568

interrogate a defendant as to what the defendant's title is; and also upon the notion that before the Judicature Act a plaintiff in ejectment at law could not maintain a bill of discovery in equity in aid of the ejectment, and that in no case had such a bill been allowed. Subsequent research has brought to light fifty-seven cases in the time of Queen Elizabeth (referred to in the Calendars of Chancery proceedings), and a series of cases from the time of Lord Nottingham, in which bills of discovery were filed in equity in aid of ejectments at law. In some of these cases discovery was decreed; in others it was refused for reasons special to those cases, the general right to discovery being assumed; in none was it held or even argued that such bills would not lie, though they were resisted on every possible ground. Of these cases the most important are:—*Attorney-General* v. *Du Plessis* (1), in which Lord Hardwicke said that the right of the Crown to discovery was not a prerogative right, but the same as the right of any subject; *Rumbold* v. *Forteath* (2); *Brown* v. *Wales* (3); *Drake* v. *Drake* (4); *Bennett* v. *Glossop* (5); *Chadwick* v. *Broadwood* (6); *Hylton* v. *Morgan* (7); *Butterworth* v. *Bailey* (8); *Crow* v. *Tyrell* (9); *Jones* v. *Jones* (10); *Wright* v. *Plumptre* (11); *Pennington* v. *Beechey* (12); *Devenreux* v. *Devenreux* (13); *Grey* v. *Grey* (14). The books of practice contain common forms of interrogatories in aid of actions of ejectment: e.g. Cole, Eject. and 2 Van Heythuyson's Eq. Draftsman; Spence's Eq. Jur.; Hubback on Succession; and see Wigram, Disc. and Mitford, Pl. Ch. These authorities carry the case as far as is necessary; but if not Order XXXI. extends the right to discovery beyond the old practice in equity. It is said that the Orders affect procedure only and not rights, but the question whether evidence can be got by interrogatories before trial is one of procedure. In common law actions of ejectment interrogatories were allowed, and by sect. 21 of the

(1) Parker, 144, 164; 1 Bro. P. C. 419.
(2) 3 K. & J. 44, 748.
(3) Law Rep. 15 Eq. 146.
(4) 3 Hare, 523.
(5) 3 Hare, 578.
(6) 3 Beav. 308.
(7) 6 Ves. 293, 295.
(8) 15 Ves. 358.
(9) 2 Madd. 397, 408.
(10) 3 Mer. 165, 166, 170.
(11) 3 Madd. 481, 486.
(12) 2 S. & S. 282.
(13) Ca. temp. Finch (Nelson), 324.
(14) Ca. temp. Finch (Nelson), 444.

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Judicature Act, 1875, all forms of procedure are to continue in force. The plaintiff can ask anything relevant to his own case, anything which he could ask the defendant in the witness-box in Court. Moreover he can ask what case the defendant is going to make against him at the trial, e.g. whether he is going to deny that the plaintiff is heir, or to set up some other heir: *Eade* v. *Jacobs* (1); *Towne* v. *Cocks* (2); *Sketchley* v. *Conolly* (3); *Harland* v. *Emerson* (4). As to discovery of documents: since the decision of the Court of Appeal in this case the Court of Appeal in *Daniel* v. *Ford* (5) has held that no affidavit of documents can be required from a defendant in such an action, but the authorities are all the other way; it is enough to cite *Ferrier* v. *Atwool* (6); *Attorney-General* v. *Gaskill* (7); *Felkin* v. *Lord Herbert* (8); *Minet* v. *Morgan* (9); *Attorney-General* v. *Corporation of London* (10); *Balguy* v. *Broadhurst* (11); *Wright* v. *Vernon* (12); *Goodall* v. *Little* (13); *Greenwood* v. *Greenwood* (14); *Nolan* v. *Shannon* (15); *Saull* v. *Browne* (16); *Harris* v. *Harris* (17); *Jenkins* v. *Bushby* (18); *New British, &c., Company* v. *Peed* (19). The plaintiff may inspect the defendant's title-deeds if the recitals help the plaintiff to make out his own case: *Coster* v. *Baring* (20).

[The arguments and authorities on both sides as to what particular interrogatories were allowable, and to what extent they must be answered; as to what documents were privileged from inspection; and as to the effect of the Statute of Limitations, are omitted, the House not having determined these questions.]

Feb. 27, March 1, 2. *Horton Smith* Q.C. and *O. L. Clare*, for the respondent:—

The decisions below were right. This is only a common law

(1) 3 Ex. D. 337.
(2) Law Rep. 9 Ex. 45.
(3) 11 W. R. (Q.B.) 573.
(4) 8 Bli. (N.S.) 62, 83.
(5) W. N. (1882), p. 165; W. N. (1883), p. 27.
(6) 12 Jur. (N.S.) (Ch.) 365.
(7) 20 Ch. D. 519, 526.
(8) 30 L. J. (Ch.) 798.
(9) Law Rep. 8 Ch. 361, 365.
(10) 2 Mac. & G. 247; 19 L. J. (Ch.) 314, 319.
(11) 1 Sim. (N.S.) 111.
(12) 1 Drew. 344.
(13) 1 Sim. (N.S.) 155, 161.
(14) 6 W. R. (Ch.) 119.
(15) 1 Moll. 169.
(16) Law Rep. 17 Eq. 402.
(17) 3 Hare, 452.
(18) 35 L. J. (Ch.) 401.
(19) 3 C. P. D. 196.
(20) 2 Com. Law Rep. 811.

action of ejectment with sundry statements designed to evade the Statute of Limitations. The plaintiff's conveyance was after the twelve years had run, and was a mere purchase of a pretenced title. In a simple ejectment the plaintiff could not before the Judicature Act and therefore cannot now claim discovery. The common law practice must prevail, for this action could not before the Judicature Act have been brought in equity. In equity there was no right to discovery; and therefore none under the Common Law Procedure Act, 1854: *Horton* v. *Bott* (1). In *Flitcroft* v. *Fletcher* (2) discovery was allowed to a defendant in ejectment, but in *Edwards* v. *Wakefield* (3) that decision was doubted, and was eventually overruled: *Stoate* v. *Rew* (4); *Pearson* v. *Turner* (5); *Wallen* v. *Forrestt* (6); *Finney* v. *Forwood* (7). On grounds of public policy the defendant ought not to be obliged to help the plaintiff to turn him out; a plaintiff in ejectment must recover by the strength of his own title alone. The cases cited contrà do not establish the propositions contended for. In *Coster* v. *Baring* (8) no decision was given, the parties having compromised. In *Sketchley* v. *Conolly* (9) the interrogatory allowed was, "Is some one else the real defendant?" In *Towne* v. *Cocks* (10) the decision was wrong; and the case was not thoroughly argued. Moreover tithes are an exception to the general rule, and come within the jurisdiction of equity: see *Bellwood* v. *Wetherell* (11). *Eade* v. *Jacobs* (12) was a case of landlord and tenant; and its real effect is explained in *Attorney-General* v. *Gaskill* (13). No case exists where a bill of discovery lay merely in support of an action of ejectment at common law. In the cases cited, for some reason such as loss of title-deeds, fraud, or the like, the plaintiff was obliged to come to equity and then he got such discovery as equity allowed. In *Attorney-General* v. *Duplessis* (14) the bill was for relief. In *Brown* v. *Wales* (15) collusion was

(1) 2 H. & N. 249; 26 L. J. (Ex.) 267. 3 Jur N.S. 568
(2) 11 Ex. 543; 25 L. J. (Ex.) 94.
(3) 6 E. & B. 469. 2 Jur N.S. 762.
(4) 14 C. B. (N.S.) 209.
(5) 16 C. B. (N.S.) 157. 10 Jur N.S. 741.
(6) Law Rep. 7 Q. B. 243.
(7) Law Rep. 1 Ex. 6.
(8) 2 Com. Law Rep. 811.
(9) 11 W. R. (Q.B.) 573.
(10) Law Rep. 9 Ex. 45.
(11) 1 Y. & C. Ex. 211.
(12) 3 Ex. D. 337.
(13) 20 Ch. D. 529.
(14) Parker, 146.
(15) Law Rep. 15 Eq. 146.

(2) 11 Jur N.S. 191

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alleged; the present objection was not taken, and it was a case of landlord and tenant, which stands on a different footing. In *Rumbold* v. *Forteath* (1) and *Harland* v. *Emerson* (2) there were outstanding legal estates, and an allegation that the plaintiff could not proceed at law and must come to equity. In *Wright* v. *Vernon* (3) there was an outstanding term. Not only is there no authority in favour of the appellant, but there are authorities to the contrary effect. The rule laid down in 1 Maddock's Ch. Pr. 3rd ed. p. 276, is that "The title of an heir is a legal one, nor is he, it seems, entitled to discovery, unless there are incumbrances standing in the way, which the Court would remove to enable him to assert his legal right." He cites *Tanner* v. *Morse*, in Trin. T. 7 G. 2 (4), and *Lady Shaftesbury* v. *Arrowsmith* (5). To the same effect are *Mutloe* v. *Smith* (6); *Crouch* v. *Hickin* (7); *Armitage* v. *Wadsworth* (8); *Pennington* v. *Beechey* (9). In *Drake* v. *Drake* (10) the application failed; so in *Bennett* v. *Glossop* (11). The decision in *Crow* v. *Tyrrell* (12) went on fraud. There must always have been some equitable ground for the discovery sought, and here there is none. The books of practice do not carry the case further than the cases already discussed, and the rest of the appellant's authorities have no bearing on the matter. The Judicature Act, 1873, sect. 25, does not alter the rule of public policy above stated, and Order XXXI. only relates to procedure and does not affect rights. The Chancery Consolidated Order XV. rule 4, is still in operation, and the defendant may decline answering interrogatories to which he might demur, as he might to these under the old practice. In any case the defendant is not bound to make a "full and sufficient affidavit" in answer, as asked for by the summons: Seton on Decrees, ed. 1877, p. 141. As to the documents, the counter-part agreements shall be produced, and this is all the plaintiff is entitled to.

The House took time for consideration.

(1) 3 K. & J. 44, 748.
(2) 8 Bli. (N.S.) 62.
(3) 1 Drew. 344.
(4) Unreported.
(5) 4 Ves. 66.
(6) 3 Anst. 709.
(7) 1 Keen, 385, 390, 391.
(8) 1 Madd. 189.
(9) 2 S. & S. 282.
(10) 3 Hare, 523.
(11) 3 Hare, 578.
(12) 2 Madd. 397, 402.

March 19. EARL OF SELBORNE L.C.:— H. L. (E.)

1883

LYELL v. KENNEDY.

Earl of Selborne, L.C.

My Lords, the action in this case (brought in the Chancery Division of the High Court of Justice) is to recover possession of real estate in England, with mesne profits, by a legal title. The plaintiff exhibited interrogatories, in the ordinary course, to obtain discovery from the defendant of certain matters which (as I understand them) are all relevant to the plaintiff's, and not to the defendant's case. To these interrogatories (with an exception, which I need not more particularly mention) the defendant has in effect refused to give any answer; and in that refusal he has been upheld by the judgments of Vice-Chancellor Bacon and the Court of Appeal.

I should be very sorry to encourage appeals to your Lordships' House from interlocutory orders upon interrogatories raising no question of principle. But this appeal does raise an important question of principle.

The decision of the Court of Appeal, as understood by both parties, proceeded upon the general ground that a plaintiff in ejectment, claiming by a legal title, is entitled to no discovery, even of matters relevant to his (the plaintiff's) own case, from the defendant in possession. It was held (I think correctly) that the right of discovery under the present rules of the Supreme Court is not in principle more extensive than it formerly was in the Court of Chancery; and the plaintiff's counsel was challenged to produce authorities in support of the right of a plaintiff, in an action of ejectment at law, to file and obtain an answer to a bill of discovery in equity. This, as I understand, he was not at that time prepared to do; and it seems to have been concluded that the settled course of practice in equity was against the existence of such a right, and that this practice was founded upon principles which are, indeed, altogether beyond question; viz., that a plaintiff in ejectment at law must succeed (if at all) by the strength of his own title, and that it is against public policy to assist him in searching into the evidences of the defendant's title. Reference was also made to a case at law of *Horton* v. *Bott* (1), in which a discovery of matters relevant only to the defendant's title was very properly refused. It does not, however, appear to me to follow

(1) 2 H. & N. 249; 26 L. J. (Ex.) 267.

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from those principles, or from the case of *Horton* v. *Bott* (1), that a plaintiff in an action of ejectment, suing upon a legal title, ought to be denied that discovery of matters within the defendant's knowledge, and tending to support, not the defendant's but the plaintiff's case, to which a plaintiff at law would be entitled in any other kind of action.

In the argument before your Lordships the appellant's counsel produced a series of authorities which if they had been cited in the Court of Appeal might not improbably have satisfied that Court (as I believe they have satisfied all your Lordships) that bills of discovery in aid of the title of plaintiffs at law, in actions of ejectment, were neither unknown to the Court of Chancery nor excluded by any rule or practice of that Court; on the contrary, that they were dealt with in the same manner and on the same principles as similar bills in other cases.

If there had been such a course of practice as that supposed, it must have been familiar to the leading writers on the law of discovery—Sir James Wigram and Mr. Hare. There is, however, no trace of it in the learned treatises of either of those authors. What they say is inconsistent with it.

Mr. Hare's work was published in 1836, before that of Sir James Wigram, by whom it is much commended. He says (page 198): "That which has been said of the action of ejectment" (quoting Lord Mansfield's words in 4 Burrow, 2487, "The plaintiff cannot recover but upon the strength of his own title," &c.) "seems not less applicable to every suit seeking to change the right and the possession of property." "A case has been put of an ejectment brought against a party in possession who cannot, by filing a bill against the plaintiff in the action, compel a discovery of his title deeds by merely" (I may observe that in Mr. Hare's book the word "merely" is in italics) "alleging that they would shew that he had no title. The defendant is left to sustain his case or defend his possession as he may. The purposes of justice are accomplished in affording to the plaintiff all the evidence that tends to establish affirmatively the facts upon which he insists."

Sir James Wigram (2nd Edition, 1840, page 14) lays down what he calls "the two cardinal rules in the law of discovery," as

(1) 2 H. & N. 249; 26 L. J. (Ex.) 267.

follows: "First, the right, as a general proposition, of every plaintiff to a discovery of the evidences which relate to his case; and, secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own." In the several "propositions" founded on these two cardinal rules, which he proceeds to formulate, and to the elucidation of which the rest of his treatise is devoted, his language is equally large; and the exceptions from and qualifications of those rules and propositions which he examines in detail at pages 79–120 do not touch the present question. He states expressly (page 122) that the expression "every plaintiff" is meant by him to include a plaintiff at law, who files a bill for discovery only in equity, as well as a plaintiff in equity who seeks relief.

Examples of bills for discovery only, in aid of actions of ejectment brought in Courts of law, are found in *Crow* v. *Tyrell* (1). *Wright* v. *Plumptre* (2), *Pennington* v. *Beechey* (3), *Drake* v. *Drake* (4), *Bennett* v. *Glossop* (5), and *Brown* v. *Wales* (6), cases which came (all but one of them, on demurrer or plea) before Sir John Leach, Sir James Wigram, and Sir John Wickens. In four of those cases the demurrer or plea was overruled, and it was held that discovery must be given; in another, a plea of purchase for valuable consideration without notice (as to which see Wigram, Discovery, 2nd ed. pp. 81 and 82) was allowed. The sixth came before the Court, after a full answer, upon a motion for the production of deeds, which was refused because the deeds appeared by the pleadings to be evidence of the defendants' title only, and for no other reason. In none of those cases was there the least trace of any objection, in principle, to such a bill of discovery. In one of them (*Drake* v. *Drake* (4)) Sir James Wigram said: "This is a mere bill of discovery in aid of an ejectment . . . . The allegation" (of the plea), "if true, is not in law a bar to the action, and if the plaintiff is entitled to the relief he seeks at law, he is primâ facie entitled to discovery also. If the plaintiff is entitled to recovery at law, his right to discovery is, primâ facie, incident to his right to the relief; and the defendant can no

(1) 2 Madd. 397.
(2) 3 Madd. 481.
(3) 2 S. & S. 282.
(4) 3 Hare, 523.
(5) 3 Hare, 578.
(6) Law Rep. 15 Eq. 147.

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more refuse to give discovery in such a case than he could refuse to answer a bill for relief in this Court, where the right to the relief in equity could not be controverted." *Butterworth* v. *Bailey* (1) is another case of a bill of discovery only, in aid of an ejectment at law, which came before Lord Eldon, after a full answer, upon a motion to amend by adding a prayer for relief; which motion was refused, but upon grounds not implying any doubt that the bill, as it stood, was proper according to the course of the Court.

In *Hylton* v. *Morgan* (2) the bill was not for discovery only, but also prayed that the defendant to the action of ejectment might be restrained from setting up outstanding terms. Lord Eldon refused an interlocutory motion for an injunction, saying, "There are two ways of proceeding. You may get a discovery in aid of ejectment; but, if you will have equitable relief to aid the trial of your right at law, you must have that relief upon a decretal order prior to the trial at law." *Jones* v. *Jones* (3) was a case in which the plaintiff, stating in his bill a legal title to land, on which he was about to proceed at law, asked relief, to which a demurrer was allowed. Sir William Grant said: "If this had been a bill merely for discovery, there are several parts of it to which an answer must undoubtedly have been given."

It was admitted by the learned counsel for the respondent that discovery in aid of an ejectment at law might always be obtained by a bill praying relief, even if the relief were only to prevent the setting up of outstanding terms. It is unnecessary to consider whether the present action, in a Court which can give both discovery and relief, may not (for this purpose) be equivalent to a bill praying relief; because the right to discovery really rested upon the same principles, whether relief was prayed or not, and whether there was or was not any special equity beyond that which was, in all cases alike, the foundation of the right to discovery. Upon this point, Sir James Wigram's authority may again be referred to. He states (pages 5 and 6) that the distinction between bills of discovery and bills for relief, "so far as principle is concerned, has no real existence. . . . The right of

(1) 15 Ves. 358. (2) 6 Ves. 294.
(3) 3 Mer. 170.

discovery is, in both cases, founded upon one and the same principle." (See also page 122 of the same work).

I am, therefore, of opinion that the general ground on which the judgment appealed from appears to have proceeded, cannot be maintained; and that, unless the whole matters inquired into by the interrogatories, which the defendant has not answered, are irrelevant to "the plaintiff's case about to come on for trial," in the words of Sir James Wigram's second Proposition (Wigram, Discovery, p. 15), the defendant must make some sufficient answer to those matters.

The plaintiff claims by conveyance from alleged co-heiresses of Ann Duncan, who died in 1859, being at the time of her death entitled to and seised of the land sought to be recovered in the action, as the defendant admits. The plaintiff will have to prove at the trial that the persons through whom he claims were in fact the heirs of Ann Duncan. In aid of that part of his case, he has addressed to the defendant, by his 20th and 21st interrogatories, a series of questions which are certainly not irrelevant. The defendant by his answer, has claimed privilege for any information which he may possess on the subject of those questions, but he has not, to my mind, answered with the particularity and distinctness necessary to reduce the discovery, which he so declines to give, to matters clearly within the privilege which he claims.

If the plaintiff succeeds in establishing the fact of heirship, it will also be necessary for him, at the trial, to repel the defence of the Statute of Limitations, the action having been brought more than twelve years after Ann Duncan's death. Most of the special averments in the statement of claim, and the interrogatories founded on them, have for their object to repel that defence; and, if they are proved in fact (the heirship being also proved), the question will have to be determined at the trial whether they are sufficient for that purpose in law. Unless their insufficiency is so manifest as to make it certain that they raise no question proper for determination at the trial (whatever the facts may then turn out to be), the plaintiff ought to be at liberty to prove this part of his case by all proper means, discovery included.

The case, so set up by the plaintiff, amounts in substance to this, that the possession which the defendant has had of Ann

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Duncan's estate from the time of her death was obtained, and retained, by means of the assumption by him of a fiduciary character towards her heirs, whoever they might be; and that he has from time to time made admissions to that effect, acknowledging himself to be accountable on that footing, sometimes by writing under his hand, and sometimes on oath, including two letters addressed by him to the plaintiff himself, though before the plaintiff had any title.

The plaintiff, as I understand his pleading, claims the benefit of the fiduciary relation so alleged to have been undertaken by the defendant; and he will, doubtless, at the trial insist that when he commenced this action he was entitled to, and did, affirm and ratify, and that the defendant was estopped from denying, that fiduciary relation. I express no opinion on the question whether this case, if established, will be sufficient in law to repel the defence of the Statute of Limitations; but I think it raises a question proper to be determined at the trial upon such facts as the plaintiff may then be able to prove, and not proper to be prejudged by an interlocutory order upon interrogatories at this stage of the action. The defendant, therefore, must answer the interrogatories relevant to that portion of the plaintiff's case. It is no sufficient objection that the plaintiff may have, and to some extent (on his own shewing) has, other means of proving the facts inquired after. Admissions of the facts by the defendant might simplify the proof and materially diminish the expense of trial. Of the interrogatories in detail (of which I cannot approve the length) no more need now be said than that I think they ought generally to be answered in substance, subject to any privilege against particular discovery which the Defendant may be entitled to claim.

A subordinate question arose upon a summons for the production of certain documents admitted by the defendant's affidavit of documents, filed on the 4th of November 1881, to be in his possession or power, as to some of which he appears to have intended to claim privilege under the doctrine of *Clagett* v. *Phillips* (1), *Pearse* v. *Pearse* (2), and other well-known authorities; while as to others he probably intended to object to their produc-

(1) 2 Y. & C. C. C. 86. (2) 1 De G. & S. 12.

tion as not being relevant or material to any question to be determined at the trial; though (if the plaintiff should succeed at the trial) they may then become relevant to the consequential account. On comparing the third paragraph of the affidavit, in which protection is claimed for those documents, with the body of the second part of the first schedule in which they are described, the description does not appear to me to agree, as it ought to do, with the claim of privilege. But I think that the respondent ought to be permitted to remove this difficulty, which now stands in his way, by a further and better affidavit, if he is able to do so; which, as to some at least of the documents described in the latter portion of the schedule, appears to be extremely doubtful.

What I propose to your Lordships is, to reverse the orders appealed from, and to remit this case to the Court below, with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories, and also to file a further and better affidavit as to all the documents which he objects to produce. The respondent ought, I think, to pay the costs here, and the costs of the summonses in both the Courts below, whatever may be the result of the action.

LORD WATSON:—

My Lords, at the conclusion of the arguments in this case, I was of opinion, with all your Lordships, that the cases cited at the bar for the appellant completely displaced the reasons assigned for their judgment by the Court of Appeal.

The case has been so fully considered in the judgments of your Lordships, which I have had the advantage of perusing, that I shall content myself with saying that the judgment proposed by the Lord Chancellor appears to me to be just in principle and in strict accordance with the settled practice of the Equity Courts.

LORD BRAMWELL:—

My Lords, I agree in the conclusion that has been arrived at by those who have preceded me, and in their reasons. But the respect which is due to learned judges makes me think it desirable to shew that I have formed an opinion for myself. And I wish also

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to call attention to the principle which ought to govern this case, and which, except by Lord Justice Brett, seems to have been lost sight of.

As a general rule a party to a suit in the Superior Courts has, to support his own case, a right to discovery from his opponent. This must be because the law supposes that the ends of justice will be furthered thereby. But it is said that the case of a plaintiff seeking to recover land is an exception to this rule. I cannot agree. Such an exception can only exist because justice in such suits would not be furthered by such discovery, or because it is not desirable it should be. It seems to me impossible to say the former. The truth will be got at by the same means in suits to recover land as in other suits. We are driven therefore to the only other reason, viz. that in such suits it is not desirable that justice should be furthered thereby, which is impossible. Why should it not? Why not by all the means by which it is furthered in other suits? It was said by my brother Brett that public policy is opposed to it. Why? It is said that the plaintiff in such a suit recovers on the strength of his own title. Supposing that was true in such suits and in them only, why should he not be at liberty, in order to establish that title, to use the procedure, as in all other suits, to prove facts? But the truth is, a plaintiff always, if he recovers, does so on the strength of his own title. If the action is for the detention of a chattel, the plaintiff must shew a title to it. If on a bill of exchange, he must shew the defendant is a party, and so on. I see no reason in principle for the defendant's contention.

As to the authorities, they are to my mind clear for the plaintiff. After their examination by the noble and learned Lord on the woolsack I will not trouble your Lordships with any remarks, except this, that in my opinion *Horton* v. *Bott* (1) was rightly decided, but is no authority for the decision in this case.

I am of opinion that this appeal should be allowed.

LORD FITZGERALD:—

My Lords, I have also arrived at the conclusion that the order of the Court of Appeal cannot be sustained, inasmuch as the rule

(1) 2 H. & N. 249; 26 L. J. (Ex.) 267. 1 Jur. N.S. 568

on which it was supposed to rest does not exist. There is no principle properly applicable in support of that order, and it seems to me that it does not recommend itself to our notions of justice. There can be no doubt what the Court of Appeal intended to decide, as the reported language of the Lords Justices is so plain and clear. Lord Justice Brett is reported to have said, "Therefore this action seems to me to be clearly an action brought in order to recover possession of land, and the right to recover is rested upon the legal title of the plaintiff. The question then is whether in such an action the plaintiff can interrogate the defendant upon the matters affecting the plaintiff's title, or, I will put it as high as this, whether he can interrogate the defendant at all." (1)

The Lord Justice then proceeds to discuss that question, and after some observations on the rule that a plaintiff in such an action must succeed, if at all, on the strength of his own title, he says that the plaintiff "must shew that he himself has the legal title to the possession of the property, and must shew it entirely by his own means, the defendant not being called upon to answer anything or to disclose anything;" and he adds further on, as a conclusion, "therefore, neither before the Common Law Procedure Act nor afterwards was a plaintiff in ejectment allowed to interrogate a defendant for the purpose of supporting the plaintiff's claim."

The Master of the Rolls puts it as forcibly and as clearly. After inquiring whether there was any case in which a Court of Equity had enforced discovery under such circumstances, he observes (2), "There is no such case, and the reason is, that it would be against public policy." And further on he adds, "The rule was that a man must recover in an action of ejectment by the strength of his own title alone, and I think there was a good reason for it; but, reason or no reason, the course of practice in these actions is conclusive as to the non-existence of the right of a plaintiff in an action of ejectment to file a bill for discovery in aid of his action."

Mr. Horton Smith, in his argument for the defendant, took very high ground indeed when he urged that "the plaintiff can have

(1) 20 Ch. D. 490. (2) 20 Ch. D. 488.

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no answer—this is a point of high public policy." It did occur to me on the opening that the discussion ought to be a very short one, but the case has been debated at great length, as involving a principle applicable to all actions of ejectment on a legal title when the plaintiff's title is controverted.

A great number of cases were cited and commented on, and we were referred to several text-books of considerable authority. The industry of Mr. MacClymont discovered and brought under our notice several cases in point, and I entirely agree with the noble and learned Earl on the woolsack, as the result of the examination of the authorities, that there exists no rule or practice in equity which forbade the enforcement of discovery in aid of an action of ejectment founded on a legal title, and that, on the contrary, bills of discovery in such cases were entertained, and discovery enforced as in other cases.

Having arrived at that conclusion, the appeal must be allowed, and the defendant must answer. If interrogatories have not been put bonâ fide, or are oppressive or irrelevant or scandalous, or are subject to any other valid objection, it will lie on the defendant to apply to strike them out, or he may refuse to answer some of them on special grounds, or he may in the present case seek to postpone some portions of the discovery until the plaintiff has established heirship.

I may be permitted to observe that your Lordships' decision does not in the least trench on the rule or maxim so much relied on in the Court below, that a plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the weakness of the title of the defendant in possession, or, in other words, that the plaintiff must prove his title before the defendant can be called on to enter on his defence. Possession is enough for him until the plaintiff has shewn a right to take that possession from him. "Melior est conditio possidentis" is not confined to land, though more frequently applied to the actual and visible possession of land than to chattels, for the possession of land has ever been regarded by the law with some degree of favour, as primâ facie evidence of ownership in fee. In *The King* v. *Bishop of Worcester* (1) it is said, "When you will

(1) Vaughan, 58.

recover anything from me it is not enough for you to destroy my title; but you must prove your own better than mine. For it is both rational to conclude you have no right to this, and therefore I have, for without a better right, 'melior est conditio possidentis' regularly."

The plaintiff does not contest this maxim or seek to escape from it. He admits that he must prove his title, and can only succeed on a proved title. He claims to be permitted to prove that title. He seeks to do so now by the examination of the defendant as to his (the plaintiff's) title, just as he would be entitled to call the defendant as a witness on the trial and examine him as to the pedigree on which the plaintiff relies, or any other step in his title on which the defendant may be a competent witness.

The contention of the defendant, on the other hand, seems to be inconsistent. He says the plaintiff must prove his title, but "he is not permitted to interrogate me now to it, even though I may be the plaintiff's only witness." There is nothing in the maxim, and there is nothing in public policy or in the policy of the law, which deprives the plaintiff of the ordinary right of proving his own title by the lips of the defendant.

There was another question discussed in the case on which I desire to guard myself, viz., whether under the Judicature Act and rules the right of discovery is or is not more extensive than it formerly was in Courts of Equity. It was put thus,—the Judicature Act is an Act to regulate procedure, and not to affect established rights, and if there was no right to discovery before the passing of the Judicature Act, there is no right to interrogate now. On these propositions I refrain from expressing any opinion, save that they are stated too largely, for there can be no doubt that the Judicature Act in carrying into effect the object stated in its preamble, "the better administration of justice," does interfere with and alter rights. If the expressions used be limited to "discovery," and to "administering interrogatories," the rules clearly do make an alteration as to what has been called "right;" for example, a Court of Equity in the exercise of its auxiliary jurisdiction did not lend its aid to enforce discovery where the action was in respect of a mere tort,

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but I should think that a plaintiff may now, in such an action, exhibit interrogatories and enforce discovery.

It seems to me also not to be very clear that an increased power to exhibit interrogatories to the defendant, and enforce discovery as to the plaintiff's title, or vice versâ, is an interference with the right of the party interrogated, or is more than alteration of procedure. Since the passing of the Evidence Amendment Acts, making all parties competent witnesses, it is difficult to see that there can be a "right" in any litigant to refuse to answer proper interrogatories where he is liable to be called as a witness and examined vivâ voce to the same matters.

The Judicature Act and Order XXXI., seem to confer on the litigant in every action the right to exhibit interrogatories to his opponent, subject to the protection given by the exercise of judicial discretion, and by the succeeding rules of Order XXXI.; and probably the intention was to give the litigant in all cases a right to interrogate his adversary as to every relevant matter on which he could examine him, if he thought fit to call him as his witness on the trial of the cause.

Orders appealed from reversed; with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories, and also to file a further and better affidavit as to all the documents which he objects to produce: respondent to pay the costs of this appeal and the costs of the summonses in both the Courts below; cause remitted to the Chancery Division.

Lords' Journals 19th March 1883.

Solicitor for appellant: *J. Balfour Allan.*

Solicitors for respondent: *Rooke & Sons, for Earle, Sons, & Co., Manchester.*

[HOUSE OF LORDS.]

BROWNLIE AND OTHERS (LIQUIDATORS) . . APPELLANTS;
RUSSELL . . . . . RESPONDENT.

H. L. (Sc.)
1883
March 9.

Building Society—Effect of Winding-up Order on Position of Members—Compulsory Withdrawal—Right of Borrowing Member to receive Credit for all Instalments, and pay up Balance of Loan, and be relieved of further Liabilities—37 & 38 *Vict* c. 42 (*Building Societies Act*, 1874), ss. 14, 16.

A building society, registered under the Building Societies Act, 1874, had for its objects: 1, to form a good investment for investors; 2, to advance to shareholders money for building and other purposes, to a not greater extent than the amount of their shares, on their granting a bond for the same over heritable security. The rules provided that the shares were to be limited to £25; that a shareholder who had not received an advance was to pay up his shares by monthly instalments; and when such instalments with profits amounted to £25 per share he was to be paid out.

As to a member who had received an advance, it was provided that he should pay up his advance by monthly instalments on his shares with interest at the rate of 5 per cent. on the loan. It was also provided that members could withdraw on giving a month's notice. On withdrawal by an unadvanced member, he was to receive the whole instalments paid on his shares with interest. On withdrawal by a borrowing member, he was to pay up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares with interest calculated thereon. A. took shares for the sole purpose of obtaining an advance. He executed a bond in common form as security; and the society granted him a back-letter, to the effect that they agreed not to enforce the bond so long as the regular payments of the instalments, interest, and other sums due upon his shares were paid. A. regularly paid his instalments with interest charged on the whole sum lent. Losses having been incurred, the society was in February, 1880, ordered to be wound up voluntarily. There were no outside creditors. In July, 1880, A. gave notice, under the rules, of withdrawal to the liquidators, and claimed a discharge of his bond on his paying to them the difference between his loan and the amount in cumulo of the instalments paid by him, with interest added. The liquidators denied his right to withdraw after liquidation, unless he paid up the whole loan and left the instalments to be refunded according to the result of the liquidation:—

Held, affirming, with a variation, the judgment of the Court below, that the advance had pro tanto been extinguished by the total amount of the instalments paid by A.; that from and after the date of the winding-up order A. had a right to redeem his security by paying to the liquidators the difference between his advance and his instalments with interest added thereon as against excess of interest which he had been charged; and on payment of such difference, with interest thereon, he was entitled to be relieved of all further liability as a contributory or otherwise.

APPEAL from the Second Division of the Court of Session, Scotland.

H. L. (Sc.) 1883 BROWNLIE v. RUSSELL.

James Russell, the respondent, is an advanced shareholder of the "Scottish Savings Investment and Building Society." He raised this action to have it found that he was entitled—though the society has gone into liquidation—to withdraw therefrom and be relieved of all further liability upon certain payments. The liquidators, the appellants, resisted this claim.

This building society was established in 1856, under 6 & 7 Will. 4, c. 32; and was subsequently registered under the Building Societies Act, 1874 (1). Its rules so far as important for the decision of the case were as follows:—

(1.) Its objects shall be—1st. To provide a mode of investing the savings of its members securely and profitably; 2nd. To advance funds on heritable security, and to enable its members to erect or purchase houses or other heritable property, in terms of the statute 6 & 7 Will. 4, c. 32, and the following rules.

(2.) Each share shall be of the value of £25, and members may hold any number of shares that may be agreed upon . . . .

(5.) The shares shall be paid by monthly instalments of two shillings, or four shillings, or six shillings per share, as may be agreed upon. The monthly instalments shall continue to be paid until (with the profit arising thereon) they amount to the full value of £25, when the members holding such paid-up shares shall be paid out of the society, in the order of the shares being realized, and as the funds of the society permit. In the event of the society not being prepared to pay out a member when his shares are realized, he shall receive interest at the rate of five per cent. per annum upon the amount of his shares, or upon the balance of the amount from the time of the shares being realized, until the member receives his full amount.

All payments shall be entered in a pass-book, provided by the society and held by the member.

The profits of the society shall be ascertained annually, and shall be declared by the manager in his statement of the accounts made to the members at their annual general meeting. And within three months after said meeting, the amount of profits accruing to each member in proportion to his capital, arising from instalments and profits, and to the time such capital has been in the society, shall be ascertained and carried to the credit of his account in the ledger, and also placed in his pass-book with the society as contingent profits, subject to the rules of this society, and to the Act 6 & 7 Will. 4, c. 32, s. 1.

(9.) Members who have not received an advance may at any time . . . . withdraw the whole or any portion of their shares at any time after twelve months from the date of entry, by giving one month's notice, when the whole

(1) Sect. 14 enacts: "The liability of any member of any society under this Act, in respect of any share upon which no advance has been made, shall be limited to the amount actually paid or in arrear on such share, and in respect of any share upon which an advance has been made, shall be limited to the amount payable thereon under any mortgage or other security, or under the rules of the society."

instalments on the shares withdrawn shall be repaid with interest as follows:— If the shares are withdrawn during the second or third year, the instalments shall bear interest at the rate of 4 per cent. per annum; if during the fourth or fifth, 4½ per cent.; and after that, and until the shares are realized, 5 per cent. Members withdrawing shall be paid out in the order of their application, and as the funds permit.

(10.) A main object of the society being to make advances to its members for the purpose of building, purchasing, or improving houses, lands, or other heritable subjects, the directors shall make such advances to the extent of the funds at their command, ... the sum to be advanced shall be disposed of as follows: One-half shall be given to the member or members applying for advances, according to the priority of application; the other half shall be given to the member or members who shall offer the largest bonus for the same on being submitted to competition..... No member shall have a right to have an advance allocated to him, nor shall any member be entitled to bid for the money when offered for sale, unless six months' instalments, and all other payments due on his shares, shall have been paid; nor shall he receive a larger advance than the amount of shares for which he has subscribed.... Every member who receives an advance shall grant a bond or other deed or deeds for the same over the heritable property offered by him in security, under which deeds the directors may exercise all the ordinary rights and powers of mortgagees.

(12.) Repayment of advances.—All advances shall be repaid by monthly instalments, with interest at the rate of 5 per cent. per annum; and which interest shall be paid monthly, in advance, and at the same time as the instalments. Any member failing to pay his instalments or interest when due shall be charged a fine of 1*d.* per month on every sum of 2*s.* he shall fail in paying.... It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society, upon giving the manager one month's notice in writing, and paying up the whole of his debt, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon calculated at the rates referred to in Rule IX.

... All the property vested in the society in security shall be insured by the manager, in the name of the trustees, at the expense of the borrower, with such insurance company as the directors may appoint, and that to the extent of the money advanced by the society, less the amount of instalments that may be paid on the shares upon which the loan has been granted, if any so desire it, but such adjustments of the amount in policies not to be made oftener than once in three years, and only if the member so desiring is not in arrears of payments.

In 1868 the respondent, for the purpose of obtaining a loan, became a member; and twenty-eight shares of £25 each were allotted to him, and he received thereon an advance of £700, on payment of a bonus of £14, and £3 4*s.* in the name of entrance fees and fines. A bond and disposition, in common form, was granted by him over certain heritable securities, and the society executed in his favour a back-letter, or minute of agreement,

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which, proceeding on the narrative that the respondent had obtained an advance of £700 from the society as the amount of twenty-eight shares held by him therein, and had granted a bond for said sum over certain securities, continued: "It is hereby declared that notwithstanding the said bond and disposition in security being in the usual terms as regards the date of payment of the principal sum and interest, it is nevertheless understood that the same shall not be enforced by the directors of the said society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums, to become due upon his said shares in terms of the rules of the said society."

Since the date of the advance the respondent has repaid by monthly instalments a large portion of the advance; on the 20th of February, 1880, the date of winding-up, he had paid in instalments of principal £414 8*s.*; and the instalments of interest paid amounted to £411 5*s.*, the interest being always charged on the whole amount of the debt, *i.e.*, £700. Since the 20th of February, 1880, he has paid further instalments to account of the advance, which up to August, 1880, amounted to £26 16*s.* The following are extracts from the respondent's pass book:—

MR. JAMES RUSSELL, IN ACCOUNT WITH THE SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY, ON 28 SHARES, NOS. 16,552–16,579.

Dr. *Cr.*

When due.	Instalments on Shares.	Bonus and Interest on Advance.	Entrance Fees and Fines.	TOTAL.
1867.	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
November . .	2 16 0	..	1 9 0 0 2 4	4 7 4
December . .	2 16 0	..	0 4 8	3 0 8
1868.				
January. . .	2 16 0	..	0 7 0	3 3 0
February . .	2 16 0	..	0 9 4	3 5 4
March . . .	2 16 0	..	0 11 8	3 7 8
April . . .	2 16 0	..	..	2 16 0
May	2 16 0	..	..	2 16 0
June . . .	2 16 0	..	..	2 16 0
		2 18 4	..	2 18 4
July. . . .	2 16 0	2 18 4	..	5 14 4

CARRIED FROM OLD PASS BOOK.

When due.	Instalments on Shares.	Interest.	Entrance Fees, &c.	TOTAL.
1879.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
	392 0 0	387 18 4	3 4 0	783 2 4
July. . . .	2 16 0	2 18 4	..	5 14 4
August . . .	2 16 0	2 18 4	..	5 14 4
September . .	2 16 0	2 18 4	..	5 14 4
October . . .	2 16 0	2 18 4	..	5 14 4
November . .	2 16 0	2 18 4	..	5 14 4
December . .	2 16 0	2 18 4	..	5 14 4
1880.				
January. . .	2 16 0	2 18 4	..	5 14 4
February . .	2 16 0	2 18 4	..	5 14 4
Total . .	414 8 0	411 5 0	3 4 0	828 17 0
March . . .	2 16 0	2 0 0	..	4 16 0
April	2 16 0	..	..	2 16 0
„ . . .	2 16 0	..	..	2 16 0
June . . .	2 16 0	9 11 2	..	12 7 2
July. . . .	2 16 0	2 17 0	..	5 13 0
August . . .	2 16 0	2 16 6	..	5 12 6

CONTINGENT PROFIT ACCRUED ON 28 SHARES OF NOV. 1867, NOS. 16,552–16,579.

	£ s. d.
Up to 28th February 1869	1 14 8
„ „ 1870	3 17 9
„ „ 1871	5 17 7
„ „ 1872	7 13 5
„ „ 1873	10 11 10
„ „ 1874	14 2 2
„ „ 1875	15 19 0
„ „ 1876	19 10 3
„ „ 1877	22 14 5
„ „ 1878	21 12 5

CONTINGENT PROFIT ACCRUED ON SHARES OF NOS.

	£ s. d.
Up to 28th February 18	
„ „ 1879 (Loss)	39 7 3

The liquidators, on the 8th of March, 1880, circulated the following letter:—

Sir,—We think it right to explain to you, as one of the members of the Scottish Savings Investment and Building Society, the position in which you are placed in consequence of the winding-up order which was pronounced on the 20th of February, 1880, and the effect of that order upon your contract with the society.

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The two immediate effects of the order upon the general body of shareholders are, that contributions cease from that date, and that withdrawals cannot take place thereafter. The whole funds of the society fall to be realised and divided among the members, according to their interest in the society when the winding-up began. Members in arrear of their contributions at the date of winding-up must pay up their arrears, including the instalments for February, 1880; and borrowing members must pay up their debts. Members who had given notice of withdrawal, and whose instalments were in arrear at that date, must pay up such instalments to said date.

It follows, from the fundamental idea of a winding-up, that as all the members are to be on an equal footing in proportion to their share in the society, no interest can run on any shares, or on any sums at the credit of any shares, from the date of the winding-up order. If the funds when realised yield more than enough to pay the principal sums in full, the surplus will fall to be divided as profits or bonus, not as interest.

Seeing that no interest runs on the money at the credit of any shares, it follows that until the loan is reduced by dividends, or payments made to account of the loan itself, the interest must continue to be paid on the full sum borrowed. But as all members who are not borrowers stop their contributions at the date of the order to wind up, it is clear that borrowing members must, to be placed on the same footing, be held to pay their subsequent instalments to account of the loan. The effect, then, of the winding-up order on borrowing members is that any instalments paid or dividends declared after its date go to diminish the debt, and reduce the corresponding interest, and not to increase the sum paid up on the shares or the stake of the members in the society.

As already explained, the winding-up prevents the subsequent withdrawal of members, and the result to borrowers paying off their debts is that loans, if paid up, must be paid in full. The liquidators are prepared, however, to entertain proposals in such cases for the payment or deposit of a sum of money to meet the contingencies of winding-up, and so facilitate the realisation of the society's assets.

On the 22nd of July, 1880, the respondent's agents wrote to the liquidators' agents as follows:—

We have been instructed by Mr. James Russell to intimate to you, as agents for the liquidators of this society, that he is prepared forthwith to pay, in terms of the rules, the balance due by him of the advance of £700 received on or about the 16th of May, 1868, provided a discharge of the heritable bond executed by him on the said date in security of the said advance be granted by the liquidators. Mr. Russell's monthly instalments at the date of the winding-up order amounted to £414 8s., and he has paid subsequent to that date the sum of £24. In arriving at the balance due interest will fall to be credited to him on the amount of his instalments in terms of rules 9 and 12. We shall be glad to know if the liquidators will accept this intimation as sufficient notice under the rules, and whether they will agree to discharge Mr. Russell's bond in the manner now proposed.

The agents for the liquidators replied that as the society is now

being wound up under the supervision of the Court, they did not admit the right of any member to retire from it pending the liquidation.

The respondent thereupon raised this action by petition in the Sheriff Court of Lanarkshire, praying the Court to order—

First, That an advance or loan of £700, obtained by the petitioner from the said society on or about the 15th of May, 1868, has been extinguished pro tanto by the sum of £414 8*s.* being the cumulo amount of instalments paid by him from time to time to account or in respect thereof from the said date to the 20th of February, 1880, the date when the said society was appointed by the Court to be wound up voluntarily; and that the said liquidators are bound to impute towards extinction of the said advance or loan all instalments that the petitioner has paid or that he may pay to them subsequent to the said 20th of February, 1880, to account or in respect thereof: *Second*, That the petitioner, as a borrowing member of the society, upon giving notice in terms of rule 12 thereof, and upon payment to the liquidators of the difference between the said sum of £700 and the cumulo amount of the monthly instalments paid by him from time to time to the date of such notice to account, or in respect of the said advance or loan, with the interest due to him thereon calculated and added thereto, in terms of rule 9 of the said society, is entitled, in accordance with the rules of the society, and with the universal custom and practice thereof, to withdraw therefrom, the liquidators being thereupon bound to execute a formal discharge of a bond and disposition in security for £700 granted by him over heritable subjects situated in Francis Street and Crawford Street, Glasgow, respectively, on or about the 15th of May, 1868, in security of said advance or loan: *Third*, That the liquidators are not entitled to set apart or apply the said sum of £414 8*s.*, or any portion thereof, in satisfaction of the losses sustained, or to be sustained, by the members of the society inter se: *Fourth*, That at all events the petitioner is not bound, since the said 20th of February, 1880, to pay interest on the full amount of the said advance or loan of £700, but simply on the sum of £285 12*s.*

There were two other alternative cravings, but they are not important.

The appellants lodged answers.

The pleas in law for the respondent were as follows:—

(1.) Upon a sound construction of the rules of the said society, the instalments paid by the petitioner extinguished, and were intended to extinguish *pro tanto*, the amount of the said loan. (2.) The petitioner, on a fair and reasonable construction of rule 12, and in conformity with the universal practice and custom of the society with regard to borrowing members, is entitled to withdraw from the said society upon payment of the balance of the said loan due by him. (3.) The petitioner being simply a debtor of the said society to the extent of his advance, is not liable to bear a share of the losses incurred by the non-borrowing members or shareholders of the society inter se. (4.) The petitioner having paid interest on the full amount of his loan, without regard to the instal-

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ments thereof repaid from time to time, upon the footing that he would be entitled to participate in the profits of the society, and the said profits having been superseded by the liquidators, he is now only bound to pay interest upon the balance of the said advance.

The pleas in law for the appellants were:—

(3.) The instalments paid by the petitioner having been paid to account of his shares in the society, and not to account of his debt, he is not entitled to credit therefor in the manner claimed by him. (4.) The effect of the winding-up order is to equalise the rights and liabilities of all the persons who happened to be members of the society at its date, and to prevent the withdrawal of any members thereafter until the liquidation is completed. (5.) As the instalments paid by all the members alike, whether such members have borrowed from the society or not, have been paid to account of such members' shares, to allow the pursuer or other borrowing members to impute such payments to account of their debt would produce inequality among the members, and is therefore illegal. (6.) The losses (if any) sustained by the society having been sustained in consequence of transactions entered into prior to the winding-up order before mentioned, and while the pursuer was still undoubtedly a member, he is not entitled, by giving notice of withdrawal, to escape his share of responsibility for such losses. (7.) Except in so far as the same may be altered or modified by the terms of the Building Societies Act, 1874, and the winding-up order, the rules of the society still regulate the contract between the members thereof and their several rights and liabilities as such members. The liquidators are therefore bound to enforce all fines and penalties for failure to make punctual payments in terms of said rules. (8.) The pursuer having paid no more by way of instalments than any other member of the society of the same standing and holding the same number of shares, he is not entitled in virtue of his having borrowed from the society to get interest on the sum so paid, while other members who have not borrowed are not getting interest.

The following minute was lodged for the respondent.

The petitioner formally tenders payment to the liquidators of £117 19*s.* 4*d.*, being the sum due by him as at this date in connection with the advance of £700 referred to on record, or in accordance with an account attached.

The liquidators also lodged a minute to the effect that there were funds enough in their hands to pay all the debts due to third parties.

On the 22nd of February, 1881, the sheriff-substitute (Guthrie) pronounced an interlocutor as follows:—

The petitioner, James Russell, is a member of the Scottish Savings Investment and Building Society, holding twenty-eight shares, and he obtained on the 16th of May, 1868, a loan of £700 from the society, being the amount of his shares, for which he granted a bond and disposition in security over certain property in Crawford Street and Francis Street, Glasgow, the security having

since been restricted, on the 28th of October, 1874, to the property in Francis Street; finds that since the said 16th of May, 1868, the petitioner has regularly paid instalments on his shares to the amount in all of £414 8s., as at 20th of February, 1880, the commencement of the liquidation, besides regularly paying interest thereon; finds that the petitioner is not entitled to withdraw from the society on the terms set forth in the 12th rule of the society; finds that the petitioner is entitled, on paying up the balance of the said sum of £700, after deducting the amount of said instalments or subscriptions, being £285 12s., with interest on the said £700 until payment of said balance, and less discount at 4 per cent. on the said sum of £285 12s. from the date of payment to the date at which each instalment on said shares would have been payable under the rules, to receive from the respondents a discharge of his said bond and disposition in security, reserving hinc inde all rights and liabilities of the petitioner as a member of the said society; and with regard to the other cravings of the petition, appoints parties to be further heard on the 3rd of March next.

On the 19th of March, 1881, the sheriff-substitute pronounced the following further interlocutor :—

Refuses the third craving in the petition; finds and orders that if the petitioner should not elect to pay up the balance of the loan of £700, as stated in the previous interlocutor, he is not bound, since the 20th day of February, 1880, to pay interest on the full amount of the said advance or loan of £700, but only on the sum of £285 12s., being the balance due by him as at the said date, after crediting the sum of £414 8s., paid to account or in respect thereof, and quoad ultra, in respect of no opposition, finds and orders in terms of the remaining part of fourth craving.

The liquidators having appealed against these judgments to the Court of Session, the Second Division on the 7th of July, 1881, pronounced the following interlocutor :—

Recal the interlocutor of the sheriff of the 22nd of February, 1881, appealed against; find that the advance or loan of £700 obtained by the respondent (pursuer) from the Scottish Savings Investment and Building Society, registered under the Building Societies Act, 1874, and having its registered office at 53, West Regent Street, Glasgow, has pro tanto been extinguished by the sum of £414 8s., being the amount in cumulo of instalments from time to time paid by the respondent to account or in respect thereof, from the 15th of May, 1868, to the 20th of February, 1880, when the said society was by the Court appointed to be wound up, and that the appellants are bound to impute towards extinction of the said advance or loan all instalments paid to them by the respondent since 20th of February, 1880, or may yet be paid to account or in respect thereof; find that the respondent, as a borrowing member of the said society, on giving notice in terms of rule 12 of the said society, and upon payment to the appellants of the difference between the said sum of £700 and the amount in cumulo of the instalments paid by him to account or in respect of the said advance or loan, with interest due to him thereon, calculated or added thereto in terms of rule 9 of the said society, is entitled to withdraw therefrom, and

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that the appellants are bound thereupon to execute a formal discharge of the bond and disposition in security for £700, dated and recorded in the Register of Sasines for Renfrewshire and Regality of Glasgow, &c., 16th of May, 1868, granted by the respondent to the trustees for the said society, in security of the said advance or loan; find the respondent entitled to expenses in the Sheriff Court and in this Court, and remit to the auditor to tax the same, and to report; and decern (1).

On the 20th of July, 1881, the Lords of the Court of Session pronounced an interlocutor by which they decerned against the appellants with expenses.

The appellants appealed against these interlocutors except so far as that of the 7th of July recalled the interlocutor of the sheriff.

March 8, 9. Sir *F. Herschell*, S.G., and *The Solicitor General for Scotland* (*Asher*, Q.C.), with them *MacClymont*, for the appellants:—

The question was, what was the respondent entitled to claim credit for? They maintained that the instalments which he had paid prior to the winding-up were really paid on account of his shares; he never paid any instalments in reduction of the loan. There were only two ways by which he could sever his connection with the society so as to escape further obligation, first by paying up instalments until, with profits, they amounted to £25 per share, when rule 5 provided that he should be paid out; the other was, by giving notice of withdrawal. From the date of the winding-up order no more instalments are to be paid, but the assets are to be realised and both classes of members paid out as far as the assets will go, the loss the society has incurred is to be borne by deduction from instalments paid on shares, whether those instalments were paid by advanced or unadvanced members. Then as to withdrawal, it was impossible after the commencement of the winding-up for the respondent to give a valid notice of withdrawal. The winding-up order was in effect dissolution, whether outside creditors or not. At the date of that order the society ceased to be a society except for the purpose of winding-up; the rights of parties are necessarily fixed as they were at that date; and one of the main purposes of such an order is to adjust the rights of contributories inter se, and prevent one contributory

(1) 8 Court Sess. Cas. 917.

snatching a preference over his fellow-members. The fact of a member having obtained an advance, made no difference essential to this question in his position as a member. Both classes of shareholders were on an equal footing, both could withdraw, both voted at general meetings, and both were entitled to participate at the same rate in profit; therefore it was contrary to the good faith of the contract for the respondent to seek to leave his fellow unadvanced shareholders to bear the whole losses, which he would do if allowed now to withdraw under rule 12. The Judges in the Court below treated the winding-up order as inapplicable to such a society, there being no outside creditors.

[EARL OF SELBORNE, L.C.:—But the winding-up order would be in effect dissolution.]

That was the appellants' argument. If the judgment appealed from stood the respondent must argue that all the shareholders had a right to withdraw notwithstanding the winding-up order. And the effect of that would be a race for preference, in which the first giving notice would be paid in full, and the last would get nothing. They submitted that there was no sound distinction between the unadvanced and the advanced shareholders, and that retirement should not be permitted at a time when the rights of all inter se were about to be dealt with.

[They referred to *Doncaster Permanent Building Society*, first case (1); second case (2); Companies Act, 1862, sects. 101, 130, 131; Building Societies Act, 1874, sect. 14.]

Davey, Q.C., and *Hedderwick*, contended for the respondent:—

The rights of Mr. Russell must be determined by the contract between him and the society. The appellants seek to make him pay more than he contracted to do. For, they say, the respondent must not only pay up the loan of £700 in full, but he must also be content to receive a dividend on the £414 8*s.* which he has already paid. By rule 5 the shares are strictly limited to £25; though some shareholders may pay less, none can pay more and not allowing the respondent to withdraw comes to the same thing as asking him to pay up more than £25 a share.

(1) Law Rep. 3 Eq. 158. (2) Law Rep. 4 Eq. 579.

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At the date of the winding-up order the position of all parties is to be ascertained, and the respondent as a mortgagor had the right by his contract to set off any instalment which he has already paid against the debt, and he has to that extent pro tanto discharged the debt. The effect of a winding-up order is to stop the business for the payment of instalments, and is in effect a declaration by all the members to terminate the concern just as if they had all given simultaneous notice of withdrawal. It fixes the rights inter se, and it determines what the advanced shall pay, and what the unadvanced shall receive in dividend.

The respondent was merely in the position of a mortgagor, and the primary question was the terms on which he should redeem his mortgage. His position was that of a borrower from the society of a sum to be repaid with interest by monthly instalments. In place of paying instalments like the unadvanced members, until these with profits amounted to the full value of £25, and then realise the amount, the respondent obtained at once from the society the full amount of the shares allotted to him under an obligation to repay the amount so advanced by monthly instalments; in order to insure the repayments he granted a bond, the absolute terms of which were qualified by a back-letter. While, therefore, the unadvanced member was creating a capital fund to be repaid to him, the respondent as an advanced member was repaying the amount of the shares which had already been received by him and thereby extinguishing his debt to the society. By the same payments he fulfilled at once the twofold obligation undertaken by him when the advance was made, to pay the advance and to pay up the shares; the result being that the instalments which were paid on the shares necessarily reduced pro tanto the debt. By rule 12 there was an express contract entered into with the respondent as a borrowing member, that the instalments to be paid by him monthly were to be at the same time payments on account of the shares and in repayment of the advances he received. Under that rule withdrawal must be equivalent to "redeem his security," plus the liberty to cease being a member. In *Doncaster Permanent Building Society* (1) the borrowing members were allowed after liquidation to pay up the

(1) Law Rep. 3 Eq. 158.

balances of their loans and get their property released. Having been placed on the list of contributories for the purpose of paying debts, but the debts of the society having been paid, it was held they were not liable for calls for the purpose of putting all the shareholders on an equal footing: see also *Norwich and Norfolk Building Society* (1). The present case was much stronger, for here they had a statutory provision, sect. 14 of the Building Societies Act, 1874, with regard to the liability of the advanced shareholder; and sect. 16 made it imperative that the rules must set forth the terms on which mortgages may be redeemed. Accordingly, rule 12 provided that an advanced member may withdraw at all times upon giving one month's notice and paying up the whole of his debt under deduction of the monthly instalments and interest. This right was not affected by the liquidation of the society. And even in a question with creditors the respondent is not liable beyond the balance of his debt.

[EARL OF SELBORNE, L.C.:—So that in the case of winding-up under sect. 14 of the Building Societies Act, 1874, no unadvanced member of the society can be called upon for anything more than what he is actually in arrear with at the time, either for payment of creditors or any other purpose.]

Yes. Both sets of shareholders are members of a limited society. Further, they had the back-letter, which stipulated that the bond should not be enforced as long as the respondent should continue the regular payment of the instalments upon his shares. The only meaning of this was, that the sum secured under the bond was being repaid by the instalments paid on the shares, and that on the whole amount of the instalments being paid the debt is extinguished, and all liability ceases. Going to the same result was the fact, that insurance of the secured property was restricted to the amount of the loan remaining unpaid. There was no injustice to the unadvanced shareholders in allowing the advanced to withdraw, if that was the contract.

The profits were to be earned by giving as many advances as possible. The advanced members were the society's customers—out of them the profits were made—and it might very well be,

(1) 1 Ch. D. 481.

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that to encourage the demand for advances the society entered into a contract which had the effect of throwing any loss which might occur upon the unadvanced shareholder.

The Solicitor General for Scotland, in reply.

EARL OF SELBORNE, L.C.:—

I believe that all your Lordships are of opinion, after hearing the full and able arguments which have been addressed to you, that the interlocutors appealed from are in substance right, although I am not myself disposed entirely to put the decision upon the same reasons as those which were given for it in the Court below, and though it appears to me (probably on the grounds on which I am inclined to qualify those reasons) that the form of the principal interlocutor appealed from is not that in which it is best that it should stand.

The question here really is a question of the interpretation and effect of the contract between these parties. There has been a winding-up order, and I am not inclined to hold the same language with regard to that winding-up order as that which has been held in the Court below. I see no reason to doubt the propriety of such a winding-up order in the circumstances which I collect to be the circumstances of this society, and I think that it must have all its proper and legitimate consequences according to the principles to be derived from the Winding-up Act, or at least from the Act which provides for the winding-up of companies as applied to societies of this particular description by the Acts which regulate them. We have nothing to do here with creditors—that is admitted on both sides—and nothing remains to be done in the winding-up except to adjust the rights of the contributories or members of the society *inter se*. What are those rights? How are we to ascertain them? They must be ascertained from the contract by which the parties were brought together. This is not a joint stock company; still less is it a common law partnership; but it is a society of a special kind, formed and regulated under particular Acts of Parliament for special purposes. A fallacy, which has pervaded much of the argument that has been offered to your Lordships in support of

the appeal, is that, because the members of this society are associated together for a common purpose, therefore there must, in equity and in reason, and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual state of things they may suffer. It appears to me that such a result cannot be arrived at by presumptions or inferences from the law relating to companies of a different kind, and contracts of a different kind, but that we must look at this particular contract. Now with regard to this particular contract, it was an essential part of it that there should be two classes of members, in situations materially different; one class called the unadvanced members, who by continuing in the society for a certain period of time and paying regularly what became due from them according to the rules by fixed instalments, would at the end of that period of time be entitled to receive all they had paid, with certain accretions in the event of the prosperity of the society; the other class was the class of what are called advanced members, who were to receive at the beginning the amount which the others might receive in the end, and were to be, at the time when they received it by way of advance, in the situation of debtors to the society, upon security, paying interest, and in that manner adding to the resources of the society and possibly to its profits. As has been rightly said by Mr. Davey, they were members who would have to pay but never could receive more than they received in the first instance. The other members paid in the first instance and from time to time; but they were also in the end to receive. And the rules of the society fairly provide for an option of belonging to the one or the other of those two classes of members, by taking the means there provided. That the unadvanced members were understood to be in a position beneficial to them is manifest from the fact that one of the provisions of the rules is that a certain proportion of the advances is to be obtained by payment of a bonus or premium. It is impossible, therefore, to deal with a case of this sort by presumptions or inferences not justified by the terms of the contract itself.

Then the next thing which I observe (and it is so far common

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to both classes of members) is that this is a society in which the liability of each member is strictly limited in point of amount. The rules say that the shares shall be of the value of £25 each, payable by certain instalments; and under the 5th rule they are to be treated as paid-up shares when the amounts to be credited to the member have arrived at the full sum of £25. If there were nothing but the rules, I should say that this is a clear case of a liability limited to the amount of £25 per share. But over and above the rules the Act of 1874, under which the society is governed, says expressly, "The liability of any member of any society under this Act in respect of any share upon which no advance has been made, shall be limited to the amount actually paid or in arrear on such share." In favour, therefore, of the unadvanced member, the statute reduces the liability to a lower point than the full £25—he is only to be liable (which I think means either to creditors or to anybody else) for that which is actually in arrear at the time when the liability is to be enforced, in addition to what he has actually paid. The clause then goes on to state, "And in respect of any share upon which an advance has been made, the liability of any member shall be limited to the amount payable thereon under any mortgage or other security or under the rules of the society." Now, under the rules of this society, no share is to be more than £25. The liability, if it depended upon the rules alone, would be only £25 per share, whether it was advanced or unadvanced. The mortgage in this case is given for the full amount which is advanced, namely, £25 upon each of the twenty-eight shares held by the present respondent, making in the whole £700; and there is nothing whatever in the rules to increase the liability beyond the mortgage. The result is that £25 per share, or £700 in the whole, having been advanced upon these shares, £414 had been actually repaid by the instalments required under the rules before the winding-up order was made, and there remained to be made up in some way or other (that is, there remained payable) £286 at that time. I omit, on this part of the case, to enter into the question whether the respondent was entitled to credit at the time of the winding-up order for anything more than £414, but the £414 he had actually paid; and I am totally at a loss, and have been

throughout, how to understand the argument that you can cancel or treat as a nullity any actual payment on account of that transaction, merely because the society may have made bad investments, and lost the money which had been paid. Therefore, the maximum sum required in order to reach the full limit of liability in respect of these shares was, at the date of the winding-up order, £286. I say the maximum sum, meaning that even if it should be determined that no credit was due to the respondent, except for his own actual payments, amounting to £414, and that all claim for interest on those payments was to be disallowed; still the society could not claim more than £286 from him, and that, whether the society was in liquidation or not—we know that it was in liquidation. This gentleman, on paying the full amount of his shares, would do all which, as a contributory or otherwise, he could possibly be required to do.

That point was determined in what was so far a similar case, namely, the case of the *Doncaster Permanent Building Society* (1), by Vice-Chancellor *Wood*, where he held that the advanced member was entitled to be relieved by paying up the full amount, and that when the full amount was paid up he ought not to be called upon to pay more for the benefit of those other contributories among whom rights had to be adjusted *inter se*. They must get what they can out of the assets that are forthcoming, including that contribution to them which this particular advanced member makes when he pays up the full amount which is due from him.

Well, then, the next question is, What is the contract here? Now, the respondent has £700 advanced to him. He gives, to secure that, a bond in the ordinary form for £700 and interest, with the provision that the principal shall become due at a certain date fixed in the bond; and that he is to pay a penalty, which is of course purely nominal, in case of non-payment *ad diem;* and he is also to pay interest on the principal sum at the rate of £5 per centum per annum, from the date of the bond to the term of payment "and half yearly termly and proportionally thereafter during the non-payment of the same." And then by a

(1) Law Rep. 3 Eq. 158.

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back-letter, which explains the real intent of the parties, it is provided that the bond is in substance to stand as a security only for his performance of the obligations laid upon the advanced member by the rules. "It is nevertheless understood that the same shall not be enforced by the directors and manager of the said society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to become due upon his said shares, in terms of the rules of the said society." That refers to the 12th rule, which states how an advanced member is to make the repayment of his advance. "All advances shall be repaid by monthly instalments with interest at the rate of five per cent. per annum, and which interest shall be paid monthly in advance and at the same time as the instalments."

Now it is impossible to read that rule without understanding it to be for the payment of monthly instalments by an advanced member. The mortgagor is to repay the advance made to him, for which he has given his bond in security, by those instalments which members have to pay from time to time. It is impossible, in my view, for the society to say that the instalments as received from time to time are not to be ascribed as payments to the advance. It is perfectly clear that they must be so ascribed, and that therefore this gentleman at the time of the winding-up order, having paid instalments to the amount of £414, was entitled to have full credit for that sum as a repayment, so far as it would extend, of the advance made, reducing, as I have said, the sum to be made up in one way or another to £286 at the most.

Then the question arises whether there is anything else in the bond or in the rules to vary that result, and to prevent the respondent from having a right to redeem (for on some terms he must have a right to redeem) on payment of the whole amount remaining due and advanced to him. I have not found one word from which it can possibly be inferred that, because the society sustains losses and because those losses may diminish the dividend or payment to be received by the unadvanced members, the advanced member therefore is to have his advance recalled and his position turned *ex post facto* into that of an unadvanced

member, or that any repetition of payment, as distinct from his obligation to make repayment according to his contract, can be obtained from him.

Now that would dispose of the whole of the case, in my judgment, in accordance with the views which so far prevailed both before the sheriff and in the Court of Session, but for the question which arises as to the credit to be given to the respondent for interest upon the instalments which he has paid, and which was refused to him by the sheriff, but has been allowed to him by the Court of Session. The point seems not to have been much discussed in the argument or noticed in the judgments, but it is distinctly dealt with by the interlocutor as drawn up, and it was brought to the attention of the Court, and the Court authorized the form in which the interlocutor was drawn up, after the delivery of the learned judges' opinions. Now I was in the first instance strongly disposed (owing to an imperfect understanding of the facts as I gathered them) to concur in the view of this point presented by the learned counsel for the appellants, and to be of opinion that the right to any such allowance of interest could only arise if, while the society was a going concern, there were a withdrawal under the 12th rule, and that any such withdrawal had become impossible after the date of the winding-up order. But, my Lords, as the argument advanced, I became aware that the respondent had been throughout charged interest, not merely upon the balance due from time to time after crediting the sums which, according to the contract, as I construe it, he had a right to have imputed as repayments to the principal sum, but upon the whole sum without regard to those repayments. Therefore, my Lords, if interest at the same rate of 5 per cent. down to the date of the winding-up order is allowed to him on the repayments, it will at the most balance and write off the interest with which he has been charged upon the sums which he had paid as well as upon those which remained due from him; and, upon general principles, that would appear to me to be just unless there were something in the contract plainly to the contrary. Now, I do not find in the contract, either in the rules (the 12th rule is the only one which touches the point) or the bond or in

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the back-letter, any stipulation whatever that the respondent should pay interest upon more than the amount due; and therefore the charge which he has submitted to, and about which there is no controversy in point of fact between the parties, rests upon a usage and practice which has prevailed and been allowed, and as to which it seems to me that if it is to remain undisturbed as against him he is certainly entitled to have written off in his favour interest upon the sums which from time to time he has actually paid. And I cannot but think that the true effect of the winding-up order is that which was put to your Lordships by Mr. Davey in his able argument. I think that it prevents the exercise of the option of retiring or withdrawing which was given to all the members, to the unadvanced members under the 9th rule and to the advanced members under the 12th; as to which I hold that the rules contemplate a going concern. That is consistent with the opinion expressed by Vice-Chancellor *Wood* in the case before him, who spoke of the winding-up order as substantially putting a stop to the whole thing. It takes away the option which otherwise, if the concern had been a going one, would have belonged to each member—it, by a *vis major*, as the Vice-Chancellor said (1), puts a close to the whole concern—it terminates, at that date, the account of each shareholder—it cuts off all chance of profit which if the thing had gone on both classes of members might have had under the 5th rule. It is equivalent, not to an optional withdrawal or retirement by individual members, but to a compulsory withdrawal by the operation of the winding-up order as against them all. That cannot take away from the advanced member the right to redeem his mortgage by paying up all that is due upon it; and it appears to me that although the terms, in my view, of the 12th rule do not specifically apply, yet it comes to exactly the same thing in the practical result. The respondent has a right to redeem his security—he in that way gets rid of future interest. I agree that he is not entitled to discount, but he has a right to redeem his security by paying up all that is justly due from him; and in reckoning what is justly due from him he should, as against the

(1) In *Doncaster Permanent Building Society*, Law Rep. 3 Eq. 158.

excess of interest with which he has been charged, be allowed interest on his actual payments.

That, in my view, my Lords, is the true effect of the winding-up order upon the rights of these parties. The conclusion which results from it is that while I agree with the practical effect of the order made by the Court of Session, I cannot entirely adhere to the terms of the interlocutor which they have pronounced. With respect to the interest, I think that we should have regard to the difference, if there is any difference, between the date of the winding-up order, which was in February, 1880, and the date of the last payment made by the respondent. In strictness the calculation of the interest to be allowed to him should be to the date of his last payment; and the interest to be charged against him, which is upon the balance, should be from the date of that payment. [His Lordship then moved the order and judgment, which was adopted by the House, and which will be found at p. 263.]

I think that with that alteration the interlocutor will do full justice, and will deal in this respect more accurately with the rights of the parties than the existing form of interlocutor appears to me to do. But as it makes no difference in the substantial result, I propose that the costs of the appeal shall nevertheless be paid by the appellants.

I accordingly move your Lordships to affirm, with the foregoing variation, the interlocutors appealed from, with costs.

LORD WATSON:—

I have come to the same conclusion as the noble and learned Lord upon the woolsack. The order of the 20th of February, 1880, in terms of the 32nd section of the Act of 1874, "terminated or dissolved" the society;—in other words, after that date the society existed not for the purpose of carrying on business, but solely for the purpose of winding-up.

According to the rules of the society an unadvanced member was a member who had agreed to pay up the amount of his shares by instalments, subject to this condition, that when the sum supplied by the payments which he contributed, or when these

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payments, aided by his proportional share of the profits made by the society, reached the amount of his shares, he was no longer bound to contribute, and ceased to be a member upon receiving payment. He was entitled to be paid in the order of his shares maturing. But it is clear that he took his chance of the society being able at the date when his shares matured to make payment to him, and also of the possibility of their never being able to make payment to him. The effect of the liquidation, so far as regarded such a shareholder, was in my opinion to put an end to all liability on his part beyond the amount which he was bound to contribute up to that date. So far as he had paid he was not bound to pay again; but he was bound to pay so far as he had previously failed to pay in terms of the rule; and, having done so, he was entitled, in my estimation, to receive a share of the free assets of the society (I means assets after settling with outside creditors) in proportion to his interest in the society at the time of liquidation, that interest depending partly upon the period for which he had been a member and partly upon the amount of his shares and the extent of his contribution in respect of those shares.

On the other hand, an advanced member stood in a very different position. An advance under the statute and under these rules does not mean a loan by the society upon the security of the shares: it signifies this, that the society pay to the member by anticipation the amount of his shares upon receiving in return certain considerations which are fixed by the rules. The considerations given by a member obtaining payment of his shares by anticipation in terms of these rules were that he should pay interest monthly along with each instalment, and, further, that he should protect the society from loss by giving adequate heritable security for the amount advanced to him. I may farther observe that a member obtaining an advance, so long as he did not avail himself of the power of withdrawal conferred upon him by the 12th rule, had a right to participate in profits, and was probably induced to take an advance upon these conditions, by the circumstance that he had the chance of diminishing the amount of the instalments which he had undertaken to pay by having

imputed towards payment of these instalments the proportion of the profits accrescing to his shares if such profits were made.

Reading together the rules, the bond, and the memorandum which qualifies the bond and disposition in security, I am perfectly clear that the undertaking given by the respondent was to pay one set of instalments and not two. In point of fact these payments are most properly described as instalments upon his shares, because when the shares were paid up the bond was paid, in this sense, that the holders of it had no right to proceed upon it. The stipulation in the memorandum is that so long as the respondent regularly pays the instalments upon his shares, along with the interest which is stipulated in the bond and rules in respect of the advance, the bond is not to be enforced; and it follows that if these instalments were regularly paid until all that was due upon the shares was paid, the bond would become in that event unenforceable, and he would be entitled to have it discharged.

But then, my Lords, the liquidation supervened; and what is the effect of it upon the position of an advanced shareholder? I think, with your Lordship, that from the moment when the decree of liquidation was pronounced he became disabled from taking advantage of rule 12 and withdrawing himself from the society, just as much as unadvanced members were thereby precluded from taking advantage of rule 9 and withdrawing upon the terms of that rule. But, on the other hand, it had a very material effect upon his rights and liabilities. The liquidators were no longer in a position to give him that consideration which had induced him to agree to pay instalments and interest as stipulated in the rules and in the memorandum. I do not think that it could be maintained (indeed it hardly was maintained) that the liquidators could have said to this gentleman, "You shall continue to go on paying monthly instalments and monthly interest upon your advance just the same as if the society had been a going concern." I think that he was quite entitled then to say, as a matter of right, "Seeing that you are no longer in a position to fulfil the condition which induced me to enter into these engagements, I shall pay up the shares." And that is what he proposes to do, the

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only question between the parties being as to how it shall be done.

I shall not revert to the record. I am not going to criticise it, but it is easy to discover from its terms that the real strife between the parties, which brought them into Court in this action, was that the liquidators maintained their right to impute the instalments which the respondent had paid prior to the liquidation to his share account, and to keep another account, a cross account as it has been termed in the argument, as if he had been a debtor not only upon that account but under the bond. The result of that contention, if well founded, would have been that this gentleman must have paid up the bond in full in order to get a discharge of it, leaving his interest in the other account to be dealt within the course of the liquidation. I do not think that was the right of the liquidators, because I have already indicated that an instalment paid upon one was imputable to both, and that whenever the instalments covered the amount of the bond, interest and penalties then being duly paid, the shares were paid up and the bond was at an end, and the society or its liquidators were bound to discharge it.

Then the whole question remaining is, upon what terms is the respondent to pay up the balance still due upon his shares. The Court below have found that he is entitled to pay up the balance in terms of rule 12. But in whatever manner he shall be entitled to pay up the balance beyond the instalments which he has already paid, I am perfectly clear as to this, that when he does pay that balance he will have satisfied his whole legal liability under the statute of 1874, and under the rules of this society. I cannot find in the rules, or elsewhere, any pretence for saying that after an advanced member has paid his instalments in full, in cash, the liquidators can turn round upon him and say, "We shall disallow these payments which you have actually made;" the result of which would be to render him liable in second payment, and so to enlarge the fund for the benefit of those unadvanced members whom the assets of the company may be insufficient to pay in full.

I have only to say, in conclusion, that I agree with your

Lordship in thinking that the interlocutor of the Second Division, which is appealed against, ought to stand; because, although it errs in law in assigning the right to this gentleman to settle according to the 12th rule, it gives him no more than he is in equity entitled to. Having regard to the fact that neither in the rules nor in the bond is there any legal obligation to pay interest upon any part of the £700 in respect of the amount of the shares which has already been paid by him, and considering that the authority for the excessive payments of interest which he has made rests entirely upon the custom of the society, I think it right and equitable that in adjusting this matter as between the liquidators and the advanced member, an allowance should be given to him as proposed by your Lordship.

LORD BRAMWELL:—

I am entirely of the same opinion, namely, that this judgment should be affirmed with the trifling modification mentioned by the Lord Chancellor. It seems to me clear that this winding-up, which is really a matter between the members of the society, can make no difference in their substantial rights *inter se*. It may make, and doubtless will make (and if anything that in my judgment helps the respondent), this difference, that that which had to be paid at distant times will have to be presently paid, and that which would have been received at distant times will be presently received if there are assets wherewithal to satisfy it. And that being so, the question is, What is the substantial contract between the associates in this society?

Now to my mind rule 12 is clear: "It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving to the manager one month's notice in writing and paying up the whole of his debt, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon calculated at the rates referred to in rule 9." That was the substance of the bargain which they entered into with each other. I think that that word "withdrawn" is immaterial to the matter which we have to consider here. The object of stipulating that that notice should be given

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was that the society might have information of the intention of the shareholder to pay up his money, so that they might dispose of it if they had the opportunity of doing so, and also that they might make a proper calculation of what was due from him in the shape of debt, interest, and penalties, and what was the interest payable to him. I think that that expression may be left out here; and the very fact which I have mentioned, namely, that the respondent is presently liable to pay (as undoubtedly he is) that which is due, shews to me that in considering the question before us that word "withdraw" is immaterial—we must look at the substance of the matter.

As I have already said, that rule is plain. But it is sought to qualify it in this way—True, you have paid instalments which would satisfy the claim of the society upon you to the extent of their amount with interest upon them under that rule, were it not that the society has sustained losses; and the instalments which you have so paid must be taken to be attributable in part to those losses, and consequently you have not in reality and in substance paid so many instalments as you have nominally. Now that I understand to be the contention of the appellants. What is there in the rules to justify it? There is not one word in the rules about losses being borne either by the advanced or unadvanced members; and the only reason that can be given why the advanced members or anybody else should bear the losses, is that they are to have profits if there were any. So they will undoubtedly; but it does not follow from that that they are to bear losses. It might have been a reasonable stipulation to put in if they had thought of it; but either they did not think of it, or, as Mr. Davey put it, if they did think of it they did not consider that it was reasonable to put it in, and we cannot put it in upon some speculation that if they had thought of it they would have put it in.

That seems to me, therefore, to deal with the only conceivable argument which there is for qualifying rule 12 in the way which I have suggested. It is said that the power of withdrawal is gone. As I have said before, to my mind that is immaterial in the consideration of this question. It may be that the power of

withdrawal technically is gone; but his substantial rights cannot be withheld from this man. It is true that if the society had lasted four or five years longer he would have discharged his obligation to the society by the instalments, taking the interest upon them. What is the consequence of his inability to withdraw? Not that he loses a substantial benefit, but possibly that he cannot avail himself of that mode of doing the thing. Inasmuch as the liquidation calls upon him to pay at once, it seems to me that he is entitled to that benefit. But it is said that that is hard upon the other shareholders, as it seems clear that they cannot withdraw either; but what is the consequence? He has got to pay and can, and the society can receive of him—the others have got to receive but the society cannot pay because it has not the money for them. That is a misfortune for them, but it is the bargain into which they have entered.

LORD FITZGERALD:—

I concur in the judgment which has been delivered by the noble and learned Earl on the woolsack. The sum of £700 which was advanced by the society to the petitioner, now the respondent, was an advance upon the security of the shares, in reference to which the society was to be reimbursed by the instalments on these shares, which if regularly paid would in the end amount to £700; in the meantime they were to have interest upon the advance at the rate of £5 per cent.; and the bond and disposition, with the memorandum upon it, was a security that the society should in the end be reimbursed to the full amount of their advance in the manner prescribed.

When once one had arrived at the conclusion that such was the form and character of the agreement between the parties, and further that the monthly instalments to be paid in respect of the shares were to be attributed as payments of principal out of the £700, the whole matter appeared to me to be straight and clear and free from any difficulty, and it seemed to me that all that remained in the end, in order that this gentleman should be relieved from his position as a member of the society and get back his property unencumbered, was merely a matter of computation to ascertain what remained due upon his security. Now did the

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liquidation make any difference? The liquidation may have deprived him of the advantages which he had, but it certainly did not increase the liability of the respondent. In point of liability he remained exactly in the same position as he was in before. And what was his liability supposing liquidation had not intervened? His liability could not go beyond the amount of what was due upon the £700 after crediting the instalments paid. The liquidation may have had the effect, for aught I know, of depriving him of the right of withdrawal, rule 12 giving the option of withdrawal; but that becomes very unimportant, for the case which the petitioner presented was this: liquidation has taken place—the society as a trading society has ceased to exist—it can no longer make profits, and it has come to an end, and I come to the liquidators and say, I owe you so much. I am willing to pay everything which is due upon the foot of this security, and I come now to pay it; the difference between them being this, that the liquidators insist that they should treat the entire sum of £700 as if nothing had ever been paid by the petitioner which was attributable to reduce that sum; he, on the contrary, saying, According to the contract and common sense and common justice, the sums that I have paid from time to time as instalments are to go in liquidation of this advance, and I am willing to pay the entire balance which is due. That is the real contract between the parties. As I have said, that is merely a matter of computation, when once you have ascertained the rules by which it is to be guided; and that computation in the mode which has been pointed out by the noble and learned Earl is one that works out complete justice.

It was said in the course of the argument that great inequalities resulted from adopting this view of the matter, and it was said that the inequalities carried injustice to the investing members; but I must confess that I fail to see it. The respondent does not seek to take anything from them—he is not asking for any payment whatever out of the assets of this society—he comes in simply saying, I am willing to pay you in full all that I owe you, and the utmost that I claim is a rebate of interest in respect of the instalments, which you have not credited against capital, whilst you were charging me 5 per cent. per annum upon the

entire £700. No doubt there are inequalities—there may be disadvantages on the one side or the other; but the contract entered into at the time when it was entered into, was a disadvantageous contract to the respondent, and was of great advantage to the society, and through the society to the investing members, whose money they were so investing. According to a calculation which I have made, taking the account, not according to the contract or according to the rules, but according to the ordinary principles that would have followed upon a simple mortgage account, taking each instalment as a reduction of principal, and not giving 5 per cent. upon the portions of the principal which had been paid, the result of taking that account fairly would have been that the whole of this demand would have been paid off substantially, and that nothing whatever would have been due; whereas, taking the account as it stands, according to the rules and the contract, there is a sum of £286 principal not discharged, which I think should be reduced by the amount of interest not credited to the respondent from time to time, but now *in cumulo* calculated upon the instalments which he paid, and upon which he was also paying interest at 5 per cent.

Ordered and Adjudged—That the interlocutor of the Lords of Session in Scotland, of the Second Division, of the 7th of July, 1881, complained of in the said appeal, be varied as follows, namely, by omitting the the words, "find that the respondent, as a borrowing member of the said society, on giving notice in terms of Rule 12 of the said society, and upon payment to the appellants of the difference between the said sum of £700 and the amount *in cumulo* of the instalments paid by him to account or in respect of the said advance or loan, with interest due to him thereon, calculated or added thereto in terms of Rule 9 of the said society, is entitled to withdraw therefrom;" and by inserting the following words in lieu thereof, namely, "find that from and after the date of the winding-up order, the respondent, as a borrowing or advanced member of the said society, was liable to pay to the society the difference between the said sum of £700 and the amount of the instalments paid by him to account or in respect of the said advance or loan with interest on all such instalments (except that last paid) from the times when they were paid respectively, down to the time of the payment of the last of such instalments after the rate of £5 per centum per annum: And that on payment

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of the amount of such difference, with interest thereon at the rate of £5 per centum per annum from the time at which the last instalment preceding the winding-up order was paid down to the 22nd day of July, 1880, the respondent will be free from all further liability, as a contributory or otherwise, to the said society, or to the appellants as liquidators thereof:" And it is further *Ordered and Adjudged*, that the said interlocutor, subject to the above-mentioned variation, and the said interlocutor of the said Lords of Session, of the Second Division, of the 20th of July, 1881, also complained of in the said appeal, be, and the same are hereby affirmed: And it is ordered, that the said cause be, and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this variation and judgment: And it is further ordered, that the appellants do pay to the respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk of the parliaments.

Lords' Journals, 9th March, 1883.

Agents for appellant: *Grahames, Currey, & Spens.*
Agents for respondent: *Lewin, Gregory, & Anderson.*

[HOUSE OF LORDS.]

FLEMING AND WIFE (IN FORMÂ PAUPERIS) . APPELLANTS; H. L. (Sc.)

AND 1883

THE NEWPORT RAILWAY COMPANY . RESPONDENTS. *March* 19.

Railway Works—Injuriously affecting Lands—Superior and Vassal—Construction of Feu Contract—Interdict to restrain Action for Compensation—Railways Clauses Consolidation (Scotland) Act, 1845, *s.* 6—*Exercise of reserved Powers; what not equivalent to.*

In January, 1872, A.'s predecessor in title obtained by feu contract from a superior a building lot situated at the south side of an estate. With the contract was incorporated a plan which shewed the whole estate divided into feuing lots with several streets running east and west; and one street twenty-four feet wide connecting the turnpike road on the north to another road on the south, and forming one side of A.'s feu. The lot was disponed "together with free ish and entry thereto by the streets laid down on the said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power was, that "the superior should have full power and liberty to vary and alter the said plan or streets or roads thereon in so far as regards the ground not already feued." In July, 1872, a railway company gave the superior statutory notice that they intended to take a strip of ground running from east to west through the estate. In 1877 they executed the works and, inter alia, cut off all access for carriages by the street marked on the plan running from south to north, twenty-four feet wide. None of A.'s land was taken. In an action by the railway company for interdict against A. taking further proceedings in a claim for compensation in respect that his lands were injuriously affected, under sect. 6 of the Railways Clauses (Scotland) Act, 1845:—

Held, affirming the decision of the Court below (Earl of Selborne, L.C., doubting), that A. was not entitled to compensation, because, 1. the access in question had not been "opened" in the sense meant in his feu contract before the statutory notice; and 2, there was no obligation in the feu contract cast upon the superior to pursue his feuing scheme, and give the feuars at some future time access along any of the roads or streets marked on the plan:

Also—when there is an implied obligation by the superior to prosecute his feuing scheme for the benefit of the feuars, the feuars have a vested interest de futuro in the roads and streets shewn on the feuing plan, sufficient to sustain a claim for compensation under the Railways Clauses Consolidation (Scotland) Act, 1845.

The compulsory taking by a railway company, under their statutory powers, of part of a superior's estate, cannot be regarded as equivalent, either in fact or law, to an exercise of a power reserved by the superior himself.

Solway Railway Company v. *Jackson* (1 Ct. Sess. Cas. 4th Series, 831) affirmed.

Henderson v. *Nimmo and Colquhoun* (2 Ibid. 2nd Series, 869), and *Crawford* v. *Field* (2 Ibid. 4th Series, 20) distinguished.

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APPEAL from the First Division of the Court of Session, Scotland. The question raised is whether the appellants Mr. and Mrs. Fleming have any valid claim for compensation against the respondents, the Newport Railway Company, on the ground that the forming of the respondents' railway injuriously affected the appellant's (Mrs. Fleming's) property within the meaning of the 6th section of the Railways Clauses Consolidation (Scotland) Act, 1845.

The late Rev. Thomas Just was proprietor of a considerable area of ground, known as Wellgate Park, near to Newport, in the county of Fife, which is bounded on the south by a road called the Kirk Road, and on the north by the turnpike road between Newport and Woodhaven. Mr. Just had been trying to feu this estate since 1860, and prior to 1870 he gave off several feus on the north and north-west of Wellgate Park, one of them having a frontage to the Kirk Road on the south and west; and in August, 1870, a feuing plan was prepared, shewing the mode in which it was proposed that the remainder of the park should be disposed of in lots for building purposes.

By feu contract, dated the 2nd and 5th of January, 1872, William Reid acquired one of the lots, which is described in the title as bounded on the south by the Kirk Road, on the north by a road or street 20 feet in breadth, on the east by another lot of ground still unfeued, and on the west by a road or street of 24 feet in breadth, as shown upon the feuing plan, and one half of which street in so far as opposite thereto was included in the measurement of the piece of ground thus acquired. The lot is disponed, "together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after-mentioned." The feu contract then continued as follows:—

These presents are granted under the conditions, provisions, and declarations after written, which are hereby all declared to be real burdens affecting the feu, namely, declaring always that the said William Reid and his foresaids shall be bound at their own expense to form, level, and make the half of the breadth of the said streets opposite to the said lot of ground on the north and west, when the same are opened (but which shall not be opened except in the option of the said Thomas Just or his successors, until the ground to the east and north

thereof is feued on both sides), and which shall be made in strict conformity to said plan; and also to form a footpath . . . declaring that the said streets and footpaths, when made, shall remain common thoroughfares . . . . And also declaring, as it is hereby expressly provided and declared, that the said lot of ground hereby disponed shall be used and appropriated in all time coming for dwelling-houses, and the necessary outhouses and garden, and shall not be used nor applied to any other purpose whatsoever . . . . Declaring farther, that the said William Reid and his foresaids shall have right to form a drain from the said lot of ground hereby disponed, at their own expense, in the said street bounding the said lot of ground on the north, to lead into the drain to be formed in the road or street of 24 feet in breadth on the west of the said lot of ground hereby disponed running north . . . . it being hereby declared that no obligation shall rest on the said Thomas Just or his heirs and successors to make and uphold the said streets, footpaths, water strands or gutters, boundary walls, and drains and sewers . . . . declaring that it shall be in the power of the said Thomas Just or his foresaids to order the drain to be made in the said 24 feet street . . . . and the expenses of making and upholding the same shall be paid by the said William Reid and his foresaids, and the other feuars using the same . . . . but which drain shall not be made unless in the option of the said Thomas Just or his foresaids, until the lots on both sides of said streets running north and south be feued: and it is hereby expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit; which conditions, declarations, provisions, restrictions, and stipulations above written shall be engrossed or validly referred to in all future transmissions and investitures of or in the said piece of ground above disponed, otherwise the same, as well as these presents, shall, in the option of the said Thomas Just or his successors in the superiority, be null and void.

The plan referred to in the contract of feu is admittedly the feuing plan of August, 1870; and a cursory examination of the streets laid down on it is sufficient to suggest that free ish and entry by these would be of great importance to the occupier of Reid's feu, and especially access by the road 24 feet wide on the west of it, which communicates directly with the turnpike road to the north of Wellgate Park. But at the date of Reid's feu contract none of the lots to the north on either side of that road or street had been feued out; and although the architect employed by the superior had marked off, upon the ground, the various lots for the information of intending feuars, the evidence led in the Court below shews that at that date nothing further had been done towards the formation or opening of the street.

Immediately after the acquisition of this feu, William Reid proceeded to erect three dwelling-houses upon it; and these he

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conveyed, together with his whole right and interest in the feu, to the female appellant upon the 8th of May, 1874.

The respondent company, on the 26th of July, 1872, gave statutory notice to Mr. Just of their intention to take, for the purposes of their railway, a strip of ground, then unfeued, running through Wellgate Park from east to west, a little way to the north of the appellants' feu. That strip included part of the solum of the street referred to in Reid's feu contract and shewn in the feuing plan of 1870, as leading northward to the Newport turnpike road. The amount of compensation due to Mr. Just was ascertained by arbitration; and paid by the railway company in 1876, who at the same time entered into an agreement to free and relieve Mr. Just's representatives of all competent claims for damages which the feuars might have against them on account of the railway company taking or interfering with the roads, streets, and drains on the feuing plan of Wellgate Park, or for the non-implement by Mr. Just or his representatives of obligations in their feu contracts, which cannot now be performed by reason of the company's works. It was not until the year 1877 that the railway company commenced to execute their works, the effect of which has been this,—that the railway which crosses the street already referred to, about 15 yards to the north of the appellants' feu, occupies the greater part of the 24 feet shewn as street on the feuing plan, leaving open a narrow subway for foot passengers only. Since July, 1872, the whole of Westgate Park then unfeued, so far as not taken or interfered with by the railway company, has been feued out in practical conformity with the plans of 1870: and, in particular, the 24 feet street or road bounding the Appellants' feu on the west has been opened throughout to its full breadth, with the exception of that portion of it which is occupied by the railway of the respondents.

The appellants, in July, 1878, gave due notice to the respondents of a claim to be compensated for injury to their feu by reason of the respondents' interference with its accesses. The respondents thereupon raised the action in which this appeal is taken, in order to have the appellants interdicted from proceeding upon their notice, in terms of the Lands Clauses Consolidation (Scotland) Act of 1845, on the ground that the Appellants had

and have no legal right whatever to the accesses said to be interfered with.

In addition to the injury alleged to be done by the stopping of the 24 feet road running north and south the appellants complained that the Kirk Road facing the western boundary of Mr. Just's property had been deviated to some extent to allow an overbridge, but the claim for compensation for this was abandoned in the Court below.

The respondents' material averment was as follows:—

The access to the said feu is now, and has all along been, by a road along the south side thereof, known as the Kirk Road, and the said feu has also along and to the extent of its west boundary a private way or road, running southwards, until at the south-west corner of the feu it joins the said road known as the Kirk Road. Neither at the date of the passing of the Newport Railway Act, 1870, nor at the date of the notice of the 26th of July, 1872, nor at the dates when Mr. Reed and Mrs. Fleming respectively acquired the said feu, nor at any other time, was there any road or way upon or across the ground acquired by the complainers as above mentioned, but the same was arable ground and under cultivation.

To this the appellants answered, inter alia, as follows:—

(Ans. 6.) Denied. Explained that the road on the west side of the female appellants' feu here referred to is one of the roads or streets forming accesses to the Wellgate feus as aforesaid. Further explained, that before the service of the said notice upon Mr. Just it had been laid off as a street, was in part made, and formed in fact the leading access to the respondent's property and to other feus in said Wellgate Park. It extended from the turnpike road leading between Newport and Woodhaven on the north to, on the south, the southern boundary of the said Wellgate Park, which marches with the Kirk Road referred to by the complainers, which is the private property of Mr. Berry of Tayfield, and is only a servitude road. It is further explained that the operations of the complainers have the effect of intersecting and partly occupying to nearly its whole breadth the said road or street on the west side of the appellants' property, and thus depriving her, without compensation, of a portion of the property in which Mrs. Fleming had a right of common property or common interest, and of cutting off her proper access to her feu by said street; of interfering with her accesses to her property otherwise; and generally of injuriously affecting her property.

The respondents pleaded:—

(4.) The appellants' pretended claim for compensation is unfounded and untenable in law, in respect that no access to the said feu has been interfered with or injuriously affected by the complainers in the execution of their works, and separatim, in respect that no access to the said feu ever existed upon or across the land taken by the complainers as above mentioned, or any part thereof.

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And the pleas in law for the appellants were as follows:—

(1.) The appellants having a right of common property or of common interest in part of the lands taken or used by the complainers for the construction of their railway, in terms of the Acts thereanent, are entitled in respect thereof to compensation and to have the amount thereof determined in manner claimed by them. (2.) The accesses to the appellants' property having been interfered with and their property thereby injuriously affected by the construction of the complainers' works, the appellants are entitled to compensation, and to have the amount thereof determined as aforesaid.

Proof before answer was allowed. And on the 28th of January, 1879, the Lord Ordinary (1) pronounced an interlocutor suspending the proceedings complained of; and granted the interdict. The appellants having reclaimed, the Lords of the First Division, on the 12th of November, 1879 (Lord Deas dissenting), adhered (2).

Dec. 12, 13, 14, 15. Mr. *Fleming*, the appellant, maintained that the main road shewn on the plan, twenty-four feet wide, running from north to south, was proved by the evidence led in the Court below to be a made and opened road for traffic of carriages before the statutory notice of the railway company; and that if this was not so, he submitted that on a true construction of his feu contract, with which was incorporated a map, the superior was absolutely bound to form the said road or street and give him "free ish and entry" thereby.

[He referred to *Henderson* v. *Nimmo and Colquhoun* (3) and *Crawford* v. *Field* (4).]

The Lord Advocate (*J. B. Balfour*, Q.C.), (with him *Webster*, Q.C.), maintained for the respondents that the appellants had access to their property by the Kirk Road, but he admitted that if the road in question had been made and "opened" in the sense meant in the feu contract, the appellants would have a claim for compensation: *Walker's Trustees* v. *Caledonian Railway Company* (5); but he submitted that the evidence clearly shewed that none of the roads shewn on the plan had been "opened" in that sense, at the date of the statutory notice by the

(1) Lord Rutherfurd Clark.
(2) 7 Court Sess. Cas. 4th Series, 179.
(3) 2 Court Sess. Cas. 2nd Series, 869, see post, at p. 280.
(4) 2 Court Sess. Cas. 4th Series, 20, see post, at p. 279.
(5) 7 App. Cas. 259.

railway company. Then as to the just construction of the contract. The first point was, whether the appellants had any right against the superior if no railway at all. If, for instance, the superior built a wall across the road in question. He submitted they would not; for the contract here did not give to the appellants an absolute right to have the road opened: there was no absolute right to make the street given to the feuar; nor did the superior bind himself to make, or to take an obligation from any other feuars to make it, or to put other feuars under like obligations if he did not carry out the plan: *Hislop* v. *Leckie* (1). In fact the contract was wholly in favour of the superior, with not a single stipulation against him. The words "so far as the same may be opened" gave a conditional right, which only went this far, "when the street is opened you (the feuar) shall have the right to use it." But it was not to be considered "opened" until the lots on both sides were feued, and they were not feued before 1872, the date of the statutory notice. A similar stipulation appeared as to the main drain: the appellants, as in the case of the road, were not to have the right to use it until all the lots on both sides of the road were feued. In short, the superior had the alternative to alter the plan in any manner he chose if he found that the particular mode of letting off the land there determined on did not succeed. Such a stipulation was very general in contracts of this kind.

[EARL OF SELBORNE, L.C.:—If a man in good faith said "I undertake to feu this land according to this plan, if I do so, you shall have certain rights; but to guard himself against any unforeseen circumstances he says, "I reserve the power to alter the plan if I like." If a railway company by, as it were, a vis major, takes the land, has not the feuar a right to compensation?]

The superior has exercised his power of altering the plan.

[EARL OF SELBORNE, L.C.:—The feuar had a contingent right. The superior did not bring in the railway company, he did nothing. The railway company came by virtue of their Act of Parliament and are the party obliged to make compensation. If the appellants had contingent rights to access in events which might have happened, and the superior did nothing,

(1) 6 App. Cas. 560.

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are the railway company to take away any of those rights without compensation ?]

The appellants had no interest at all. As to getting compensation, this claim arises under the Railways Clauses Act, 1845, s. 6, and not under the Lands Clauses Act. As a condition precedent, that for which compensation is claimed must have an existence, and it must be something more than a personal injury or inconvenience: it must in some way be attached to land. If the superior could have sold the site of this road for anything else as well as a railway, where is the right for compensation ? and on that assumption, neither from the superior, nor from a purchaser of the site of this road, could a feuar succeed in a claim for compensation.

[EARL OF SELBORNE, L.C.:—It by no means follows, that because an ordinary purchaser from the superior would not be liable, that therefore a railway company would not be, merely because there are certain conditions, such as here, in the feu contract. The *Solway Railway Company* v. *Jackson* (1) is very near this case.]

There the tenant was in possession, and fell under the Lands Clauses Act, ss. 23, 24. If the emerging of the right depends on the road being "opened," that decides the whole case, for when it is necessary for a condition to be fulfilled before the emerging of the right, then, not until that thing is done is compensation due.

If there would have been a right in the superior and an ordinary purchaser to cut-off this access, then would it be an injury when the railway came in and did it? that depended on whether the appellants had a right under the Railway Act to compensation: and under that statute the thing done must be something which would give rise to a cause of action, though the Railway Act authorizing it had not been passed. If it was a question where the appellants could have said,—the superior doing nothing,—"you must stop shutting up this road," then he admitted that there might be a claim; but here the appellants could not have done that, and therefore they had not such an interest of value in land which could be injured by anybody: see Lord Penzance in *McCarthy* v. *Metropolitan Board of Works* (2).

(1) 1 Court Sess. Cas. 4th Series, 831; see post, p. 281.
(2) Law Rep. 7 H. L. 243, at p. 261.

[He also cited *Glasgow Jute Company* v. *Carrick* (1); *Mark's Church Trustees* v. *Taylor's Trustees* (2); *Earl Zetland* v. *Hislop* (3); *Tailors of Aberdeen* v. *Coutts* (4).]

The Appellant, in reply.

THE LORDS, having taken time, delivered judgment as follows:—

LORD BLACKBURN having referred to the facts continued:—

The strip of land taken by the railway company did not include any part of the feu itself, which lay entirely on the south or upper side of Wellgate Park above the railway, but, as already said, the works of the railway prevented the possibility of the owners of that feu ever having a right of carriageway towards the north, and there seems no doubt that the absence of such a carriageway would affect the selling value of the feu, probably to a considerable extent, but it is enough to say to some extent; and consequently I think that there is no doubt that the appellants were damnously affected by the works of the railway. But it is now too well established to be questioned in a Court of law, that it is necessary, in order to give a claim to compensation, that the lands should be *injuriously* affected. And if the appellants' author had, by the feu charter of January, 1872, acquired a right of way for carriages from his feu on the south to the turnpike road which was along the south bank of the Tay, the works of the railway have injuriously affected his land by cutting off that right of carriageway.

The majority of the First Division of the Court of Session have held that the construction of the deed of January, 1872, was not such as to give that right. The Lord President and Lord Shand gave their reasons for so holding; Lord Mure, who agreed with them, did not give his reasons; Lord Deas held otherwise and gave his reasons. At the close of the argument at the bar of this House, I thought that the interlocutors were right. But the noble and learned Lords then present were not unanimously

(1) 8 Court Sess. Cas. 3rd Series, 93.
(2) 7 Ibid. 415.
(3) 7 App. Cas. 427.
(4) 1 Rob. App. 296.

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of that opinion. The Lord Chancellor then entertained doubts, not I believe yet entirely removed. I need not say that I have considered those doubts carefully, but I still retain the opinion which I had previously formed.

The owner of an estate which he is endeavouring to feu, generally exhibits a plan, shewing how he proposes that the feus are to be carried out. I do not doubt that it is competent to make a feu of one parcel of the land, with references to the plan, in such terms as to bind the superior in any event to give to that feuar access along the roads which, as indicated by the plan, it is proposed should be ultimately made.

The Lord President (1) gives very good reasons for thinking that it would be improvident in a superior to bind himself to do this at all events; and I think it is not too much to say that both he and Lord Shand imply that it is not usual, in the course of Scotch conveyancing, to draw up the feu charters in such a manner as to do so. But I take it that it is perfectly competent so to contract.

But it is also competent, and I incline to think, from what those learned Lords say, that it is usual, for the superior in effect to say to the feuar, "I mean to carry out the feuing as proposed; and I mean, as the feus progress, to see that roads are formed and opened, of which you will, as they are formed and opened, have the benefit; but I will not tie myself nor my successors down to this at all events, for I do not know what may happen. It will probably be, and I hope it will be, for my interest to do this, and it will be shabby in me not to do it, unless something happens to make it unfair in you to require me to do it. If you, on the reasonable expectation of this benefit coming to you, choose to take the feu, do so: but I do not tie myself down at all events."

And if this is the true construction of the feu contract of January, 1872, it seems to me to follow that the appellants, though though they have been deprived of the benefit of a carriageway, which they reasonably expected that the owners of the feu would have, and so have had their feu damnously affected, have not had their feu injuriously affected.

(1) 7 Court Sess. Cas. 4th Series, at p. 185.

It was doubted (1) whether a construction which gives to the grant to the feuar "some operation *in præsenti* from the execution of the deed, ought to be preferred, if the words of the deed will bear it, to one which suspends it upon future and uncertain events which may never happen." And if the interest of the feuar was alone to be regarded I think there would be great force in this. But the interest of the superior is also to be considered. I do not think that, if the words of the deed are not clear, there is any reason for preferring a construction which would certainly cast upon him an obligation which it would be improvident, and I think, from what is said by the Lord President and Lord Shand, unusual for a superior to incur. Lord Shand seems to go so far as to say that, to make good the case of the Respondent (Appellant before this House), "it would have been necessary to have a much more special obligation in the contract."

I do not myself know anything as to the practice of conveyancers in Scotland, and I disclaim acting on any ground depending on that. But I think that there is no reason for preferring the construction which is favourable to the feuar, to that which is favourable to the superior. And it certainly seems to me, for the reasons given by the Lord President, which I do not repeat, that the intention of the parties, as appearing from the deed of January, 1872, was to give the feuar a right of carriageway over the street indicated on the plan, only from the time that they were opened, and not before. The proposed street to the north along the west side of the Plaintiff's feu may have been opened as far as his feu extends before the railway interfered. It certainly seems to me never to have been opened at all further north than that; certainly not so far north as the point where the railway crosses the proposed street.

I therefore think that the interlocutors should be affirmed, and the appeal dismissed, and I so move. As the appellants sue in formâ pauperis, nothing need be said about costs.

LORD WATSON [having stated the facts substantially as above, continued]:—

Whether the appellants, or their predecessors, had or had not,

(1) By the Earl of Selborne, L.C.

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in July 1872, when the railway company gave their notice, such right of ish and entry by the streets or roads interfered with by the company's operations as will sustain a claim for compensation under sect. 6 of the Railways Clauses (Scotland) Act, 1845, depends upon the construction of the feu contract of January, 1872. The right of the appellants to have free ish and entry by means of a street twenty-four feet wide bounding their feu on the west and leading northward to the Newport turnpike road—which, for the purposes of this case, may be dealt with as if it were the only access claimed—was rested in argument upon these two propositions: first, that the street in question had, in the sense of the feu contract, been "opened" by the superior before the respondents gave their notice to take in July, 1872; and secondly, that, on the assumption that it had not already been "opened," the terms of the contract gave the feuar a legal right to have it opened, at some future time, for his use.

I have no difficulty in assenting to the appellants' contention that the contract of January, 1870, gives the feuar an indefeasible right of access by the streets or roads shewn on the feuing plan, from the moment that these streets are "opened" within the meaning of the deed. But it is obvious that "opening" was understood, by both parties to the feu contract, to mean something more than merely indicating the intended lines of street by means of pegs or other marks shewing the boundaries of each feuing lot, because that had been already done. It may be difficult to say, with precision, what circumstances would amount to "opening;" but I am disposed to think that, in order to constitute "opening" within the meaning of the contract, something must have been done or permitted by the superior plainly implying his will and intention that the street or road should thenceforth be dedicated to his feuars, and used by them, as an access to and from their several properties. Nothing of that kind is proved in the present case. On the contrary, I think it is proved that, at the date of the respondent company's notice, the unfeued part of Wellgate Park, to the north of the appellant's feu, was an arable field; and that, although Reid and another feuar had, by permission, carted building materials across the field, there was no road either formed or existing in the line of the access now claimed

by the appellants. I am accordingly of opinion that the first proposition maintained by the appellants is without foundation in fact.

The appellants' second proposition involves no disputed question of fact, and depends entirely upon the construction of the original feu right in favour of their author William Reid. It does not admit of doubt that an obligation to give the feuar ish and entry, at a future time, by a particular line of street, through the as yet unfeued lands of the superior, may be effectually constituted by such a deed, so as either to bind the superior and his personal representatives, or to run with the lands of the superior, into whose hands soever these may come. It is unnecessary, in the present case, to consider a distinction which might possibly be drawn between the legal effect of a real obligation attaching to the lands of the superior which were taken by the railway company, and the effect of a mere personal contract with the superior upon which no possession had followed. Under the conveyance which the respondent company obtained from Mr. Just's trustees in the year 1876, they undertook to settle, and so to relieve the trustees of all competent and legal claims for damages, which any of the feuars of Wellgate Park might have against the superior or his representatives, in respect of the company taking or interfering with the streets or roads shewn on the feuing plan. They took the lands cum onere of the superior's obligations arising from personal contract; and the question therefore comes to be whether any legal right, real or personal, to the street in question was conferred upon the vassal by the feu contract of January, 1870. I am of opinion, with the Lord Ordinary, and the majority of the Judges of the First Division of the Court of Session, that the feu contract gives no such right.

I am not prepared to hold that the terms of the appellants' feu contract impose on the superior a legal obligation to feu out the whole ground comprehended in the feuing plan, or all the ground on both sides of the streets marked thereon as bounding the appellants' feu. Such references to a feuing plan as occur in the deed in question may have the effect of binding the superior, if he proceeds with his feuing, to adhere to the plan, so far as the vassal has an interest in seeing that it is adhered to, unless the

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superior reserves a power to alter. But an obligation which would restrain the superior from disposing of the unfeued lots shewn on the plan otherwise than by feuing them out for building purposes is a burden so exceptional in its character that it could not be effectually constituted except in express terms or by implication plain. Very few proprietors, contemplating a feuing scheme of considerable magnitude, would be so rash as to warrant its completion; and in such cases the earlier feuars generally contract with the superior, in the expectation, more or less reasonable, that the scheme will sooner or later be carried out, to their benefit, as well as to the advantage of the superior; but that is an expectation which may be defeated, either by the public declining to take up the remaining feus, or by the superior finding more beneficial uses for his unfeued ground. It appears to me that the provisions of the feu contract of January, 1872, shew that William Reid contracted on that footing with his superior, the Rev. Mr. Just. In the dispositive clause, and in the conditions and provisions declared to be real burdens affecting the feu, the general feuing plan is referred to solely for the purpose of describing the lot of ground disponed, and the streets or roads by which the feuar is, in certain events, to have ish and entry. And the mutual provisions which are made as between William Reid, his heirs and assigns, and other future feuars, may be naturally and intelligibly read as having reference to possible feuars, and do not necessarily imply an obligation on the part of the superior to create these feuars. None of the judges in the Court below, not even Lord Deas, the sole dissentient, gave the least countenance to the view that any such obligation was incumbent on the superior.

Had there been an implied obligation by the superior to prosecute his feuing scheme for the benefit of the appellants, they would plainly have had a vested interest de futuro in the roads and streets shewn on the feuing plan, sufficient to sustain a claim of compensation under the Railways Clauses Act of 1845. It by no means follows that, because the appellants have not a right to insist upon the feuing plan being carried out they have no right or interest in the roads and streets shewn on that plan. These roads and streets are not, like the feuing plan, referred to for

purposes of description merely, but are made matter of special stipulation in the feu contract. In the absence of any such special stipulation, it might have been urged on behalf of the appellants that the very description of the subject feued gave them an implied right of ish and entry to it, by means of the "road or street of twenty-four feet in breadth," by which it is said to be bounded on the west. It might have been argued that, as was held by the Court in the case of *Crawford* v. *Field* (1), the vassal could not get possession of the subject described until that street was opened. But the stipulation which the parties make is this, that the feuar shall have free ish and entry by the streets and roads shewn on the feuing plan, in so far only as the same may be opened and not altered in virtue of the power reserved to the superior. According to my apprehension, the purpose and effect of that stipulation is that the feuar is to have no right or interest in any of these streets unless and until it is opened, and that he is to have no cause of complaint should the superior in the course of feuing alter the line of the streets in such a way as to render them less convenient for the purposes of access to his feu. The provision appears to me to have been framed for the purpose of protecting the superior from claims of ish and entry, at the instance of his vassal, in the possible event of his Wellgate Park property, or part of it, remaining from any cause unfeued, or of his choosing to alter the line of the streets shewn on the plan of 1870, in the course of carrying out his feuing scheme. I venture to think that the subsequent conditions of the feu contract shew that it was not in the contemplation of the parties to it to impose upon the superior an obligation to open these roads or streets, except in the possible event of his feuing out the ground on both sides of them. The obligation laid upon William Reid and his successors to form, level, and make half the breadth of the streets ex adverso of their lot on the north and west, does not take effect until these streets are "opened" throughout their whole length, it being expressly declared that they shall not be so opened, "except in the option of the said Thomas Just and his successors, until the ground to the east and north thereof is feued on both sides." The meaning of that declaration does not

(1) Oct. 15, 1874, 2 Court Sess. Cas. 4th Series, 20.

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appear to me to be doubtful. It gives the superior a right to open these streets at any time before his remaining land is feued, if he shall find it to be for his advantage to do so, and thereby to bring into play the feuar's obligation to make the half of the streets opposite his feu. But, in the event of the superior not exercising that option, the obligation of the feuar to make and maintain the streets does not emerge until the whole ground has been feued on both sides of these streets. To me these conditions seem to imply that the obligations undertaken by the feuar in regard to streets, and his right to have them opened, are, in event of the superior not choosing to exercise the option conferred upon him, both made dependent upon the completion of the feuing scheme. And being of opinion that the superior is under no obligation to feu out the whole or any part of the ground along the line of these streets, I have come to the conclusion that the interest of the appellants' author in that portion of street shewn on the feuing plan which was taken by the respondent company in July, 1872, consisted in spe and not in obligatione.

The case of *Henderson* v. *Nimmo and Colquhoun* (1), which is noticed in the opinion of Lord Deas, was strongly founded upon in argument by the appellants. The circumstances of that case as they appear from the report and the pleadings, which I have examined, were these. The superior, Sir James Colquhoun, who was feuing out the burgh of Helensburgh according to a general plan, in the year 1828, opened up a street called Glasgow Street to the width, throughout, of sixty feet, as shewn in the plan. In the same year he feued eight lots fronting Glasgow Street, which were subsequently acquired by the defender Nimmo. In the autumn of 1833, the pursuer Henderson entered into negotiations with the superior for another building lot in Glasgow Street; and in September, 1833, he was permitted to begin the erection of buildings on the faith of a feu contract being adjusted. The feu contract was not executed until the 26th of April, 1834; but in it the lot conveyed was described as bounded by Glasgow Street on the west. Meantime, by feu contract, dated the 13th of February, 1834, the superior had feued five new lots to Nimmo, all described as bounded by Glasgow Street on the east, and by the

(1) 2 Court Sess. Cas. 2nd Series, 869.

same deed he separately feued to Nimmo a strip of Glasgow Street 25 feet wide, ex adverso of his thirteen lots. The Court reduced the feu right thus granted to Nimmo, in so far as it related to the strip taken off Glasgow Street. They held, I think rightly, that the pursuer Henderson and the superior had transacted on the footing that Glasgow Street was to remain of the full width of 60 feet, to which it had been already opened. The mala fides of the superior was obvious; and the terms of the conveyance accepted by Nimmo shewed that he knew it to be in violation of the rights of other feuars. The case of *Henderson* v. *Nimmo and Colquhoun* (1) has, therefore, no analogy to the present, because in that case the pursuer's title admittedly conferred upon him an immediate right to access by a street 60 feet wide; and what the Court decided was that his right to that access was not impaired by a transaction entered into, in malâ fide, between Nimmo and the superior before the formal title to the pursuer's feu was executed.

I desire to add that, if it had been established that the appellants' feu right conferred upon them a legal interest, entitling them, as matter of right, to have the street in question, as shewn on the feuing plan, opened up at some future time, I should have held that the superior's reservation of power "to vary and alter the plan, or streets or roads delineated thereon," afforded no answer to the appellants' claim of compensation. The compulsory taking of part of the superior's estate cannot, in my opinion, be regarded as equivalent, either in fact or law, to an exercise of the power reserved by the superior himself. That was virtually decided by the Second Division of the Court, in the case of the *Solway Railway Company* v. *Jackson* (2), where the company gave notice to take compulsorily part of a considerable area of ground, let as a clay-field, under a lease which provided that the proprietor should be entitled "to resume and except from the clay-field any part of the lands at his pleasure." The company settled with the proprietor, and then sought to stop, by interdict, proceedings taken by the tenant for recovery of compensation, on the plea that they came in place of the landlord, and had only exercised

(1) 2 Court Sess. Cas. 2nd Series, 869.
(2) March 12, 1874, 1 Court Sess. Cas. 4th Series, 831.

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the power of resumption to which, as representing him, they were entitled. The Court unanimously refused to grant interdict, on the ground that the occupation of the company was attributable to their statutory powers, and could not be ascribed to the option which the former proprietor had under the lease.

I am accordingly of opinion that the interlocutors appealed from ought to be affirmed.

LORD FITZGERALD :—

I have given this case most careful consideration, and regret to have come to a conclusion adverse to the appellants, as there can be no doubt that they have sustained damage from the works of the company, but not damage of that character which the law regards as an actionable injury.

I concur in the result arrived at by the noble and learned Lords who have preceded me, and in the reasons which they have expressed for their judgments.

The whole question before your Lordships arises on the construction of that passage in the feu contract so often read, viz., "together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power aftermentioned;" and I have felt coerced to come to the conclusion that when the railway company in July, 1872, gave notice of their intention to take the portion of Wellgate Park which they required, the feuar William Reed (the appellants' author) had no legal interest in or right to ish or entry by the street or road laid down on the plan, and across which the company subsequently carried their works.

Whatever interest the feuar might otherwise have acquired is made conditional by the words, "but in so far only as the same may be opened," and until the roads were so opened by the superior (an event which might never happen), the feuar had no interest *in præsenti*, and had an expectation only of an interest to arise on an uncertain event.

The expectation was no doubt fair and reasonable, but it rested not on obligation but on the will of the superior.

It appears to me that the construction put on this portion

of the contract by the majority of the First Division of the Court of Session and by my noble and learned friends, and which I have adopted, is supported by reference to its general provisions, from which one cannot fail to see that whilst numerous conditions are imposed on the feuar and his foresaids, and declared to be real burdens affecting the feu, the utmost care is taken to protect the superior from obligation. Thus, for example, on declaring the feuar's obligations as to the roads when opened we find interposed and rather out of place, "but which shall not be opened except in the option of the said Thomas Just or his successors, until the ground to the east and north thereof is feued on both sides;" and again, "but which drain shall not be made, unless in the option of the said Thomas Just or his foresaids, until the lots on both sides of said streets running north and south be feued; and it is hereby expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The same spirit and intention seems to pervade the whole contract, in which the actual obligations of the superior seem confined to the grant of the particular lot of ground and to warrandice of that lot.

The superior having thus by the contract made "ish and entry" depend on the "opening" of the roads, and reserved to himself the right to determine when if at all that event was to take place, one cannot fail to adopt the conclusion of the noble and learned Lord (Lord Watson) that the roads cannot be taken to have been "opened" by being merely laid out on the cotemporaneous plan, and that "opened" must refer to some subsequent action on the part of the superior once and for all determining the lines and limits of these respective roads, and indicating their dedication to the use of the feuars.

In my opinion the appellants fail because they had not in July, 1872, any legal right or vested interest in the subject of controversy, the invasion of which would have then given them a right of action.

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EARL OF SELBORNE, L.C.:—

My Lords, I have felt more difficulty than the rest of your Lordships as to this case; and I have been disposed to think that I could see my way to a construction of the feu contract which would have led to a result more favourable to the appellants; but as your Lordships, after considering the reasons which I thought it right to submit to you in favour of that construction, all concur in opinion with the majority of the learned Judges in the Court below, and as no question of general principle is involved in the difference between that opinion and the view which I might myself have been disposed to take, I do not think it necessary to say more than that your Lordships' judgment must be in accordance with the conclusion at which my noble and learned friends have arrived.

Interlocutors under appeal affirmed, and appeal dismissed.

Lords' Journals, 19th March, 1883.

Agents for appellants: *Simson, Wakeford, Goodhart, & Medcalf.*
Agent for respondents: *William Robertson*

[PRIVY COUNCIL.]

FREDERICK HENRY MOORE . . . . DEFENDANT;

AND

ROWLAND MANSFIELD SHELLEY AND ANOTHER . . . . . } PLAINTIFFS.

J. C.*
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Feb. 9, 13.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Trespass—Mortgagor in Possession—Default in Payment on Demand—Damages for Illegal Seizure.

Where by the terms of a mortgage deed the plaintiffs were to remain in possession on their own account, and manage the mortgaged property until they should make default in payment of the mortgage money upon demand in writing in manner specified, and such demand was made on the wife of one of the plaintiffs during the plaintiffs' absence by a person who represented himself as the defendant's agent, and upon non-payment the defendant forthwith entered upon possession and seized the mortgaged property:—

Held, in an action of trespass against the mortgagee, that such non-payment before the plaintiffs had had any opportunity to inquire into the truth of the alleged agency did not constitute default, and that the defendant was liable to the mortgagors in substantial damages.

APPEAL from an order of the Supreme Court (March 4, 1881) refusing a rule nisi for a new trial.

This was an action brought by the respondents against the appellant and James Blackwood to recover damages for trespass on certain lands of the plaintiffs, and for the seizure and conversion of their goods, and damages for detention of the same.

The declaration alleged that the defendant broke and entered certain lands of the plaintiffs known as Wallah Wallah Station in the Lachlan district, in the colony of New South Wales, and seized and took the plaintiffs' sheep, horses, cattle and household furniture and effects, and carried away the same and disposed of them to their own use; and that he converted to his own use and wrongfully deprived the plaintiffs of the use and possession of the said goods.

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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After declaration James Blackwood died, and all further proceedings against him were stayed.

The particulars comprised 4500 ewes in lamb, three, four and five years old; 140 rams, nearly all three years old; and 5190 ewes, three and four years old, in lamb, the latter taken possession of near Cobar.

The defendant pleaded that the plaintiffs were not possessed of the property; leave and license; and that the lands were not nor was any part thereof the property of the plaintiffs.

The facts are stated in the judgment of their Lordships.

The Chief Justice directed the jury that the mortgages of the 5th and 10th of July impliedly gave the plaintiffs in the action the right to the undisturbed possession of the sheep until they made default. "On demand" meant that there should be reasonable time for the mortgagors to pay the money demanded. What was reasonable would depend upon circumstances, but that clearly to demand and forthwith take possession was not reasonable. That the seizure was unlawful, and that the only question remaining was the one for damages. That the jury must not give the whole value of the sheep, but the value less what the plaintiffs in the action owed on them.

The jury found a verdict for the plaintiffs with £750 damages.

The appellant moved for a rule nisi to set aside this verdict on the grounds of its being against evidence and the damages excessive, and on the grounds of misdirection by the Chief Justice in telling the jury that the mortgagee impliedly gave the plaintiffs a right to hold possession against the mortgagee until demand and default, and in telling them that there was a necessity under the mortgages for a demand and default before a right of entry and seizure; and that he ought to have told them that on the deeds being proved they should find a verdict for the defendant; that if the demand was made as proved, the seizure was justified, and that the question of reasonable time for compliance did not arise under the form of action as declared on by plaintiffs, and that to succeed on that ground plaintiffs must have declared specially.

Macleod, Q.C., and *T. W. Wheeler*, for the appellant, contended

that on the declaration and pleas, when the deeds were proved or admitted, the judge should have directed a verdict for the defendant on the plea of not possessed: *Doe* v. *Lightfoot* (1). Even although there are covenants in the mortgage which imply possession by the mortgagors, yet from the date of demand and non-payment possession was really in the mortgagee. Demand was not necessary before seizing and taking possession, but only as a condition precedent to selling, and abundant time was given for payment of the mortgage money before selling. Reference was made to *Rogers* v. *Grazebrook* (2); Sheppard's Touchstone, [8th ed.] p. 272, cited in 8 M. & W. 564; *Toms* v. *Wilson* (3); *Keech* v. *Hall* (4); *Fenn* v. *Bittleston* (5); *Massey* v. *Sladen* (6); Coote on Mortgages, 4th ed. p. 705. Upon the question of damages reference was made to *Brierly* v. *Kendall* (7).

Davey, Q.C., and *Horne Payne*, for the respondents, contended that they had a right on the true construction of the deeds to keep possession of the mortgaged property until the management was taken out of their hands by the due exercise of the power in the deed. That right was not terminated until default in payment had been made, and the plaintiffs were not in default until they had had reasonable time for ascertaining that demand had been made, and of complying with it. The damages were not excessive. Reference was made to *Wheeler* v. *Montefiore* (8); *Doe* v. *Day* (9); *Bradley* v. *Copley* (10); *Johnson* v. *Stear* (11).

Macleod, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from an Order of the Supreme Court of New South Wales, refusing a rule nisi for a new trial in an action in

(1) 8 M. & W. 553.
(2) 8 Q. B. (N.S.) 895.
(3) 4 B. & S. 442.
(4) Sm. L. C. 8th ed. p. 590.
(5) 7 Ex. 152.
(6) Law Rep. 4 Ex. 13.
(7) 17 Q. B. (N.S.) 937.
(8) 2 Q. B. (N.S.) 133.
(9) 2 Q. B. (N.S.) 147, 155.
(10) 1 C. B. 685.
(11) 15 C. B. (N.S.) 330.

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which the respondents were plaintiffs, and Frederick Henry Moore, the appellant, was the defendant.

The action was an action of trespass brought by the plaintiffs against the defendant and his partner, since deceased, for breaking, entering, seizing, and taking possession of a certain run, called the Wallah Wallah station, in the Lachlan district, in New South Wales, and seizing and taking possession of certain cattle, sheep, and other things which were on the run, and also for seizing other sheep belonging to the plaintiffs which were not on the run, and for converting them to their own use. The defendants pleaded that the plaintiffs were not possessed of the property; they also pleaded leave and license, and that the lands were not, nor was any part thereof, the property of the plaintiffs.

It appears that on the 10th of December, 1878, Suttor mortgaged the run and 3000 wethers, more or less, and all other sheep, cattle, or live stock then upon or belonging to or which should thereafter, during the continuance of the security, be acquired by or purchased for or be upon the run, to the defendant and his partner, Mr. Blackwood, to secure the sum of £7000 advanced and £1000 to be advanced, with compound interest thereon at 9 per cent., to be calculated by half-yearly rests.

On the 19th of February, 1879, an agreement was entered into between Suttor and the plaintiffs for the sale to the plaintiffs of the sheep run, together with 8000 wethers, nine horses, stores, and ration cart, then on the run, for the sum of £9000. It was arranged that £2000 of the £9000 was to be paid in cash, and £2000 by a bill at nine months, and that £5000 should remain on mortgage to the defendants. It was further stipulated that, in addition to the £9000, the plaintiffs should bring on the run about 10,000 good ewes of mixed ages, and that until the cash payments were made the 10,000 ewes to be placed upon the station and the station and stock should remain as a security to the defendants, but that afterwards Suttor's liability to the Defendants' firm in respect of £5000 should cease.

That arrangement was come to with the knowledge of the defendant, and he drafted the agreement. It seems to have been signed in his office. He says after that agreement was signed Suttor and the Plaintiffs left his office. He never objected nor

stated that the plaintiffs were purchasing for £9000 that which was not worth that amount, and evidently it was considered at that time that the plaintiffs were making a reasonable bargain with Suttor in agreeing to purchase the run and the sheep which were then on the station for £9000, and to bring 10,000 more sheep on to the run. The object of bringing on the 10,000 more sheep at that time was to make the property an ample security. But the arrangement having been altered, another mortgage was entered into on the 5th of July, 1879, by which the plaintiffs mortgaged to Suttor the sheep run and all the sheep on it and all the sheep then lately purchased by them from Oliver Brothers, then on their way to the station, and all sheep or cattle which should thereafter be purchased for or be upon the station, as a security for the £9000. Speaking of that mortgage, the defendant says: "I asked for security over the balance of the Melrose sheep," those were a portion of the sheep which the plaintiff had purchased to put on the run. "It had been represented to me that 6000 had been sold,"—that was the fact.—"They said they could not give security, because there was a lien over them to someone else. Eventually they told me they had got over the difficulty, and it was arranged that they should give security over the balance of the Melrose ewes and Swift and Hann, and that was to be a mortgage to Suttor, to be assigned to me." The defendant, in order to get a security beyond that which he had got from Suttor, prepared the deed, or got it prepared, as a security to Suttor, which was to be assigned by Suttor to him, and which was subsequently assigned to him by a deed of the 10th of July, 1879.

Now the question is whether by virtue of that mortgage and assignment, the mortgage being not a mortgage of lands but of a sheep run, and also of certain chattels and sheep, the intention was that the mortgagee was to have immediate possession of the chattels, or whether the plaintiffs were to remain in possession until they should make default upon demand in paying the £9000. It should be observed that no time was fixed by the mortgage for the payment of the £9000. It was merely stipulated that if the plaintiffs should pay the £9000, with interest upon demand, Suttor would re-assign the mortgage; that in case the

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plaintiffs should make default in payment of the £9000 and interest, then the mortgagee should be at liberty to enter. There were also several covenants in the deed which lead their Lordships to the conclusion that it was the intention of the parties that, until default should be made in payment of the amount upon demand, the plaintiffs were to remain in possession. Amongst others of these covenants there is one, in which it is stated that the mortgagors will "from time to time, and at all times hereafter during the continuance of this security, take, or cause to be taken, due and proper care of, and also do, or cause to be done, all such acts, deeds, matters, and things as may be necessary for beneficially or properly carrying on, the said mortgaged property, and also will and shall, from time to time, and at all times during the continuance of this security, keep the whole of the said sheep, horses, and stock hereby assigned, and the increase and progeny thereof, well and sufficiently branded or marked." That was a covenant for the performance of which it was necessary for the plaintiffs to remain in possession, and it appears to their Lordships that although, as contended by the defendant, it was not a re-demise by Suttor, it was a stipulation that the plaintiffs should remain in possession until default should be made on demand.

It was argued that it was the intention of the defendant that the plaintiffs were to remain in possession, and take care of the sheep and manage the property merely as bailiffs or servants of the mortgagee. It appears to their Lordships that that is not the case. There was no stipulation that the mortgagee should make the payments which were necessary for carrying on the business on the sheep run, or that he was to be liable for anything which the plaintiffs might do in carrying on that business, which there would have been if the plaintiffs had been the agents or bailiffs of the mortgagee in retaining the possession. It also appears clear that, in case the plaintiffs should make default in payment of the £9000 upon demand, it was to be lawful for the mortgagee "to enter upon and seize the mortgaged property, and to take possession thereof, and in his discretion to assume and continue the management thereof, and immediately thereupon, or at any time thereafter, and whether in or out of possession,

and whether he shall or shall not have so taken possession of his own accord, absolutely to sell and dispose of the said mortgaged property." Such a stipulation is not at all consistent with the fact that the plaintiffs were all along and before the defendant's entry considered as holding possession and managing the property as the agents or bailiffs of the mortgagee. Their Lordships are of opinion that it was part of the terms of the deed that the plaintiffs were to remain in possession on their own account, and manage the property until they should make default in payment of the £9000 upon demand or some other default. It is not proved that they made any other default, and the only question now is whether they did make default in payment of the £9000 upon demand. Now the defendant having prepared and got the mortgage of the 5th of July executed, and having got that mortgage assigned to him by Suttor, on the 10th of July sends an order to Mr. Campbell on the 18th of that month to take possession of the station, together with wether sheep, cattle and horses thereon. Surely, when the plaintiffs purchased the property and mortgaged it to Suttor on the 5th of July, they never anticipated or expected that it was to be seized by the mortgagee on the 18th for non-payment of the £9000 on demand. That was not the intention of the parties, although it might have been within the strict legal right of the defendant to make a demand of payment at any time and to seize in case of default. But he gives this authority to Mr. Campbell on the 18th of July, 1879, within a fortnight after he had obtained the assignment. That was a mere authority, however, to take possession of the property which had been mortgaged by the deed of the 10th of December, 1878; but it was not an authority to Campbell to take possession of the ewes which had been placed by virtue of the contract on the estate, nor to seize the ewes which were travelling, and to be brought upon the estate. Campbell, in fact, seized all the sheep that were upon the station. He says he could not help it; he never intended to seize the ewes, but they were seized with the wethers because they were mixed with them and he could not help seizing them as well as the wethers. He never intended to seize them, and he did not substantially seize them, for the benefit of the defendant. A letter was written on the 26th of July, 1879,

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by the plaintiff (George W. Shelley), to the defendant with reference to this seizure of the property, but this letter had no relation to the seizure of the 10,000 ewes, but only to the seizure of the Wallah Wallah station and the 8000 wethers and other property which were upon the run and which had been mortgaged by the mortgage of 1878. He says, "I received intimation from Mr. Campbell last night that he had instructions from you to take possession of Wallah Wallah, stating that it was under the original mortgage that the place was seized, and that if I was to see you some arrangement might be made. I am not in a position to take a trip to Sydney at once; the little money I had is exhausted, for I have been keeping the station going for five months. So by this mail I have written to my brother to see you and know what can be done in the matter. My letter cannot reach him before next Wednesday or Thursday. So it will be the end of next week before he can communicate with you. In the meantime please be kind enough to let me know whether it is your intention to sell the station, or if you would be willing to effect an arrangement." That was merely asking whether he intended to sell the station under the seizure which Campbell had made by virtue of the mortgage of 1878, not of the sheep under the mortgage of the 5th of July, 1879.

The defendant sent an answer on the 31st of July, 1879, and on the 27th of August, 1879, he sent up Mr. Thomas Berrie with a written demand for the £9000, which the bearer was authorized to receive. The deed of mortgage specified as follows how the demand of payment was to be made: "It is hereby declared that such demand as aforesaid shall be made in writing for and on behalf of the said mortgagee, and delivered either personally to the said mortgagors or either of them, or left at their or his usual or last known place of abode in the said colony of New South Wales, or on the said station or run, or sent through the medium of any post-office addressed to them or either of them, as aforesaid." The demand in writing was made on the 27th of August, 1879. It was left at the station; but the question is, Was there a default upon that demand? The plaintiff (George W. Shelley) was not there; he had no opportunity to judge whether the alleged authority to Berrie to receive the £9000

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was genuine or not. His wife had no authority to enter into that question; but because the £9000 were not then paid immediately to Berrie, the plaintiff (George W. Shelley) being absent from the station and his wife being there alone, Berrie immediately seized all the sheep which were on the station, namely, the 4500 or 5000 ewes which had been purchased by the plaintiffs and brought on to the station. Was the non-payment of the money when the notice was served upon the wife a default?

The case of *Toms* v. *Wilson* (1), which was cited in the Court below (there is a similar case in the 3rd Best and Smith (2)), is an authority to shew that there was no default to justify the seizure. It may, therefore, be well to refer to what Lord Chief Justice Cockburn says in that case: "We are all of opinion," he says, "that by the terms of the bill of sale the plaintiff was under an obligation to pay immediately upon demand in writing, and if he did not, then the defendants were entitled to take possession of and sell the goods. Here such a demand was made. The deed must receive a reasonable construction, and it could not have meant that the plaintiff was bound to pay the money in the very next instant of time after the demand, but he must have a reasonable time to get it from some convenient place. For instance, he might require time to get it from his desk, or to go across the street or to his bankers for it. There are other circumstances in the case. When, as here, the person making the demand is not the person entitled to the money, but his attorney, the person on whom the demand is made must have a reasonable opportunity to inquire into the authority of the person making the demand. The attorney may send a bailiff to make the demand and authorize him to receive the money, but the mere demand by that bailiff does not intimate to the plaintiff that payment to him will suffice; that fact, at least, ought to have been communicated to the plaintiff. And even if that fact had been communicated to the plaintiff, still, if he bonâ fide doubted the truth of the statement, he would have been entitled to some opportunity to inquire into its truth before the defendants would be entitled to seize his goods."

Here the plaintiff (George W. Shelley) had no opportunity to inquire into the truth of Berrie's statement. He was not at the

(1) 4 B. & S. 442. (2) *Brighty* v. *Norton*, p. 305.

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station when the demand was served upon his wife, but he had gone down to look after the sheep, which the defendant, on the 31st of July, 1879, told him he ought to do. Their Lordships, therefore, are of opinion that there was not a default which justified the defendant in entering upon the possession of the plaintiff and seizing the property.

The defendant not only seized the 4500 or 5000 sheep which had been brought upon the run, but he also seized about 5000 sheep which had been purchased by the plaintiffs and which were travelling on the road. It seems that the plaintiff (George W. Shelley) had purchased two lots of sheep. From Swift and Hann he purchased 5000 at 8*s.* 6*d.*, and sent them or 4500 of them on to the station. Those were on the station, and those were seized by Berrie. He had also purchased 11,000 at 5*s.* 6*d.* a head from Oliver Brothers; he sold 6000 of those at 7*s.* 6*d.*, and the remaining 5000 were the travelling sheep. Those sheep were subsequently seized in September by a man who was authorized by the defendant to seize them, and they were sold by or on account of the defendant at 7*s.* 6*d.* a head. The plaintiff (George W. Shelley), however, in his evidence said that these sheep were worth 10*s.* 6*d.* a head, and not 7*s.* 6*d.*

It is admitted that a man who has got merely an equity of redemption in property is not entitled to recover the full value; he is entitled to recover only the damage which he has sustained. Considering the price which the Shelleys were willing to give in December, 1878, and the additional sheep brought on to the premises, the equity of redemption may fairly be taken as worth a substantial sum of money. The defendant seized the station and the sheep before he was entitled to do so. He had no right to seize them until default had been made, and no default had been made; he was therefore liable to pay to the plaintiffs damages for the seizure. In the case of *Massey* v. *Sladen* (1), which was referred to in the argument at the bar, it was held that the plaintiff was entitled to substantial damages. In this case it appears that the defendant seized the 4500 or 5000 sheep which had been brought on to the station as well as those which were off the station, and that he sold those 5000 which were off the station for

(1) Law Rep. 4 Ex. 18.

7*s.* 6*d.* a head, the plaintiffs having said that they were worth 10*s.* 6*d.* The jury assessed the damages at £750, but they did not state the grounds upon which they found their verdict. Upon a motion being made for a new trial upon the ground that the jury had given excessive damages, the Chief Justice, who heard the evidence and who tried the cause, upheld the verdict, and did not think it right to grant a new trial. Sir William Manning, who was also one of the full Court before whom the case came, gave his reasons for thinking that there was no cause shewn for disturbing the verdict. Now, the jury having found the verdict, and the Chief Justice, who tried the case, and Sir William Manning, having come to the conclusion that the verdict ought not to be disturbed, we are asked in England to say that they were wrong. They were judges who may naturally be supposed to know more of matters relating to stations and runs and the value of sheep in the Colony than we do; and the jury having thought that the plaintiffs had sustained substantial damage to the extent of £750, those learned Judges refused to disturb the verdict.

Their Lordships cannot say that there was no evidence to support the verdict, and they think that they ought not under the circumstances to advise Her Majesty to say that the jury who found the verdict, the Chief Justice, who upheld it, and Sir William Manning, who supported it, were all wrong in the conclusions at which they arrived; and under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below. The appellant must pay the costs of this appeal.

Solicitor for the appellant: *Randolph C. Want.*
Solicitors for the respondents: *Morley & Shirreff.*

[PRIVY COUNCIL].

J. C.* 1883 Feb. 20, 21.

THE HEIRS OF MARTIN, DECEASED . . . DEFENDANTS;

AND

MARIE BOULANGER, ARISTIDE BOULANGER, AND EMMA BUSSIÉ . . . . } PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT AT MAURITIUS.

Civil Procedure Code, Art. 474—*Tierce Opposition—Judgment Creditors claiming under their Debtor are bound by his acts.*

Where accounts between a firm and one of its debtors had been settled by a reference and an award made thereunder, *held*, that the judgment creditors of the firm could not without alleging fraud or collusion in the proceedings on the reference be admitted to impeach the award by way of tierce opposition or otherwise. Although they were not parties to the reference and were hostile to the firm down to judgment, yet by virtue of the judgment they derived rights under a party to the reference within the meaning of Art. 474 of the Code de Procédure Civile.

APPEAL from an order of the Supreme Court (Feb. 11, 1874) whereby it was referred to the Master to compute certain accounts; the Master's report (April 1, 1875) made in pursuance of the said order, and finding a balance due from the appellants to the respondents and the parties through whom they claim; and from a final judgment of the Court (Sept. 12, 1878) confirming, except in one item, the said report.

The action in which the proceedings appealed from took place was brought in the year 1873 by the respondents, claiming to be creditors and to exercise the rights of an association called the Distillerie or Guildiverie Centrale, against the appellants and others. The object of the action was to re-open accounts between that association and the late Daniel Martin (whom the appellants, his widow and heirs, represented for the purposes of the action and of the appeal) which had been dealt with by an award given in a former action in the Supreme Court of Mauritius in the year 1865,

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

and to debit Martin with large sums on the ground of erroneous and fraudulent entries alleged by the respondents to exist in his accounts. The appellants contended that as against the Guildiverie Centrale, and therefore as against any party claiming through that association as its creditor, these accounts were finally settled by the award of 1865, and also that they were and are correct.

The facts are stated in the judgment of their Lordships.

Cohen, Q.C., and *F. Pollock*, for the appellants, contended that the above-mentioned order, report, and final judgment, should be reversed, and judgment entered for the appellants. The effect of the award of 1865 was that it bound the Guildiverie Centrale and all parties claiming through it. The respondents claimed solely as creditors of the Guildiverie Centrale. They were therefore bound by the award under s. 474 of the Code of Civil Procedure. They did not allege that the proceedings which terminated in the award were tainted by fraud or collusion. As creditors they stood simply in the shoes of their debtors as respects the award, and could not impeach it by way of tierce opposition or otherwise. See Pothier, Traité de la Procédure Civile, part III. sect. II. § 2, "De la tierce opposition;" Merlin, Répertoire de Jurisp., vo. "Opposition tierce," sec. 2, art. 2, par. 9. The principle that res judicata is binding in the way contended for is a principle of universal jurisprudence. As regards tierce opposition the right is to contest a judgment to which one is not a party, directly or derivatively: Dalloz, Dict. Gen. Jurisp. vo. "Tierce opposition." [SIR ROBERT P. COLLIER:—Can you throw any light on the local law as to the right of an association like this to sue and be sued by its representatives or officers?] There is authority shewing that this was a partnership constituted as a company—a corps moral; and it was so treated by the Court below. And "société" is more comprehensive than our "partnership": Troplong's Commentary on the Code, Droit Civil expliqué, art. 1832, pars. 12, 13; Code Civil, art. 1832. The commentators go into the question of a partnership being a moral person, or as we should say, a quasi-corporation.

The respondents did not appear.

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The judgment of their Lordships was delivered by

LORD BLACKBURN:—

The great difficulty in this case has been to gather from the complicated record what the facts were upon which the Court below decided, so as to understand the judgment, which, of course, ought to be thoroughly understood before we could say that it was not right. Now that it has been explained it is pretty clear what it was.

The first thing to look at is the declaration of the widow Bussié and others, the now respondents. On the 9th of June, 1870, they brought an action for a large sum—more than $12,000—which they claimed to be due. They claim from the Court "Judgment condemning you, the said defendants, in your above-named capacity of members of the committee of management, control, and supervision of the said Guildiverie Centrale, to pay to plaintiffs the sum of $12,439 70*c*." This claim is made against the defendants as representatives of the Guildiverie Centrale, and they claim judgment against that company.

This is made still more clear by the pleas. One of the defendants, Rochecouste, makes his appearance and avers that, as far as the Guildiverie Centrale is concerned, he has nothing to say; but he points out that they cannot touch the portion of the land on which this distillery is built. He says they cannot take that because it is held on lease under himself and that the lease will expire in a year. He objects that they cannot take that, and that they cannot touch him personally. The replication to this plea is: "That, without in any way admitting the several allegations contained in the said pleas, the plaintiffs reply that they have merely asked a condemnation against the above-named defendant," that is, Rochecouste, "in his capacity of member of the committee of management, control, and supervision of the Guildiverie Centrale, and that the issue whether the said De Rochecouste is personally liable for the amount claimed is not before the Court." So that it is clear that they are claiming against the Guildiverie Centrale, and against the Guildiverie Centrale only. The other parties plead, in their capacity of managers of the Guildiverie Centrale, that there is no debt, which, of course, is a different issue altogether.

Then come Daniel Martin, Daniel Pelicier, to whom Martin had mortgaged his claims against the Guildiverie, and Henry Ryder, who was trustee for Martin's creditors. They seek to intervene, and are permitted to do so by order of the 2nd of August, 1870. In December, 1871, Martin dies, and afterwards his heirs ask that Pelicier and Ryder may be put out of the cause, and that the heirs of Martin may continue his intervention. Pelicier and Ryder were put out by order of the 12th of March, 1872, but it does not distinctly appear when the heirs of Martin were permitted to intervene in his place. That this permission was granted at a subsequent time is certain.

Then, on the 7th of October, 1872, comes the judgment, stating that "Saving and excepting the land on which the Guildiverie is built,"—that is, the land mentioned in the plea of the first defendant—"and any personal liability of the defendants"—that again is what had been mentioned by him, and these points are put out of the question, the Court deciding nothing as to them: "the Court, to this extent and no further, gives judgment for the plaintiffs against the said Guildiverie Centrale." That clearly is a judgment against the Guildiverie Centrale. Whether the heirs of Martin had as yet been permitted to intervene is not clear; but the Court goes on to say: "And inasmuch as Daniel Martin, under a judgment of reference made a rule of this Court dated the 12th day of December, 1865, was in his lifetime in possession of the Guildiverie Centrale, possession of which has been retained by his widow and representatives to enable them to work off Martin's debt, the Court makes a remit to the Master to examine the accounts of Martin in presence of plaintiffs, and to state the balance, whatever it may be, as at the present date; other questions of costs reserved."

So far what the Court does seems to their Lordships to be, in every point of view, perfectly right. They give judgment against the firm the Guildiverie Centrale to take the firm's property; and as the Court had been informed that Martin, or Martin's representatives, were in possession of this property, not having sold it, but holding it to work off Martin's debt, they say an account must be taken to see for how much Martin's heirs are entitled to hold this land. That was intelligible and right, and

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that went before the Master. But here there is some confusion, though it certainly appears that the heirs of Martin were permitted to be parties to the reference before the Master. It is better to take the statement in the preamble to the judgment appealed against for what happened; it is in the following terms:—

"Guibert, of counsel for the defendants, contended on the other hand that the accounts anterior to the award of Chauvin, the umpire, had been fully examined by the arbitrators, their correctness affirmed by the latter, and sanctioned by the umpire, whose award was subsequently affirmed without any reservations by the Supreme Court, and made a rule of Court; that the Supreme Court never intended to re-open the discussion upon the accounts anterior to Chauvin's award, but merely wished to know, after examination of the new accounts furnished by widow and heirs Martin since the award, the final balance which may be due as at the present date to widow and heirs Martin, who have been allowed to retain possession of the 'Guildiverie Centrale,' to work off Martin's debt, fixed by the above award and judgment.

"The Master ruled in the sense advocated by Guibert, and accordingly examined the new accounts furnished by the widow and heirs Martin (two in number) from the date of the judgment of the 12th of December, 1865, and arrived as best he could at a certain balance in favour of the widow and heirs Martin. Against the finding of such balance the plaintiffs raised certain objections, which the Master declined entertaining for the reasons assigned by him, and the plaintiffs were directed to bring the present action before the Court to obtain from us a judgment which might warrant the Master to travel into the examination of the accounts anterior to Jules Chauvin's award, along with the later accounts since such award."

Who directed the plaintiffs to bring the present action does not appear. It could not have been the Court which directed, because, as far as the proceedings shew, they had not gone to the Court. It hardly could have been the Master who directed them, because he was not entitled to do so. They did, however, in fact, commence this further proceeding, and this further proceeding is the one the judgment in which is attacked.

They give their reasons in their pleadings why they should have this award opened and the matters gone into prior to the award as well as what passed since. Their Lordships remark that there is no assertion or attempt to shew that the award was obtained by collusion: there was no collateral fraud, no fraud that would have enabled anyone to say that this was a collusive judgment which ought to be set aside.

Upon that the case came before the Court, and now we have to see what is the judgment which the Court gives. Passing by the preliminary inducement, the Judge says:—"The facts above stated clearly shew the parties to the suit leading to the arbitration and final adjudication by the umpire were not the same as in this action." Now in one sense that is quite true. Robert had instituted the suit in order to have the account stated as between Martin and the Guildiverie Centrale, and the persons who represented the Guildiverie Centrale had intervened; and, no doubt, it is true that the parties in the suit commenced on the 5th of June, 1870, are the present respondents and the Guildiverie Centrale, and those in the proceeding in which the judgment appealed against is given are the respondents and the heirs of Martin, and that the parties are not the same in that sense. The Court goes on to say:—"The action filed on the 9th of October, 1863, was brought by Richard Ambroise Robert against one Daniel Martin, and the object thereof was to obtain from the latter an account of the sums received by Daniel Martin from the sale of a large quantity of rum consigned to him by the said Robert from the Guildiverie Centrale Mahebourg, in payment of certain advances made by Martin to the said Robert for the working of the Guildiverie Centrale, upon the condition, secondly, of accounting to Robert for any surplus over and above the repayment to Daniel Martin of all his advances to Robert." Their Lordships think the claim was that he was to account to Robert for the Guildiverie Centrale, so that it was really the Guildiverie Centrale that was suing. Then the order of reference was made, and the four members of the committee were in that capacity admitted as intervening parties. The Court goes on to say:—"The parties to that suit were therefore the plaintiff Robert and the defendant Martin, plus the intervening parties just mentioned.

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They were the parties who appeared before the arbitrators and umpire, and were heard by them. Whatever was decided by the arbitrators, and finally affirmed by the umpire, and subsequently by the Court, can apply to and be binding on no one but the parties to the reference." It certainly seems to their Lordships that this is not quite accurate. What was found on the reference is binding, not only on the parties to the reference, but also on every one who would, in English law, by claiming through or under them, be privy to it. The same thing seems to be the law in France, and in truth the law must be in every country the same. It is not merely that a judgment shall be binding on the parties who are the actual parties to the suit, but it must be binding upon all who claim under or through the party to it in respect to the property in dispute. Otherwise there would be interminable litigation, and every judgment would be opened again and again, and the maxim "interest reipublicæ ut sit finis litium," to say nothing of justice and convenience between parties, would be completely lost sight of. The Judge then adds:—"It is not possible that the rights of the plaintiffs in the case now before us, who are perfect strangers to the reference, should be affected by the proceedings before the arbitrators and umpire, though made a rule of this Court. There is undoubtedly res judicata as to the parties to the reference, but certainly not as to the plaintiffs and defendants in the action now before the Court." This seems to their Lordships to be a mistake. The plaintiffs were, no doubt, in one sense hostile to the Guildiverie Centrale until they obtained their judgment. They were saying, "We are entitled to a judgment, under which judgment we are entitled to take your property." But when they obtained that judgment, and were seeking to take the property, they were claiming distinctly under the debtor against whom they had obtained the judgment. This proposition is obvious, and it is borne out entirely by the authorities from the French law which have been cited to their Lordships. The Judge then says:—"The correctness of the accounts before the arbitrators and affirmed by the umpire could only be so found and affirmed as to the parties to the arbitration, who alone had the right and opportunity of criticising those accounts, a right which could not be, by any

possibility, exercised by the plaintiffs in this case." Certainly it could not; but the plaintiffs claim under the Guildiverie Centrale, who could and did exercise those rights. He then proceeds to say:— "This action, therefore, though not so in terms, is in fact and in law neither more nor less than a tierce opposition to the judgment arbitral which is sought to be enforced against the plaintiffs so as to shut them out of the possibility of examining or criticising the accounts furnished by the defendant in a quite different suit between the defendant Martin, Robert, and other parties, to which suit, however, as already observed, the plaintiffs were no parties in person, nor were they nor could they be represented on the reference by any of the parties thereto, whose interests were in the first place adverse to those of the plaintiffs in the cause now before the Court; and, secondly, the plaintiffs in this cause do not derive their rights under any of the parties to the reference" —referring to the article 474 in the Code de Procédure Civile, in which it is said that those who derived their rights under the parties to the reference, or those who represented them, were as much bound as if they were themselves parties. The learned Judge does not cite any authority at all upon this point, but the reason of the thing, as well as the authorities which have been brought to the notice of their Lordships, shews strongly that though, as has been truly said, the creditor is not a party up to the time when he has obtained judgment and is hostile up to the judgment, yet when he has obtained judgment against his debtor he acquires the rights of the debtor, and when he takes property of the debtor is claiming under him within the meaning of the phrase that has been used. Their Lordships think that the Judge has made a mistake on that part of the case, and that he ought to have said that the Master was perfectly right in considering that this was res judicata; that it was settled as between the firm and Martin by Chauvin's award, and was consequently settled as between Martin and anyone claiming under or through the firm; that the plaintiffs, being creditors, claimed under the firm within the meaning of that decision; and that consequently the award ought to be considered res judicata against them, and that they should start from the fixed basis that the account stated at that time was right and was not to be departed from, nothing in the

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nature of collusion or fraud which would enable it to be set aside being alleged. That being so, the judgment given in this case that it should go back to the Master to open up that account was wrong, and the subsequent proceedings ending in the final judgment were wrong also.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the Supreme Court of Mauritius of the 11th of February, 1874, and the judgments consequent thereupon. The suit in which that judgment of the 11th of February, 1874, was given will be dismissed with costs, and the respondents will be ordered to pay the costs of this appeal.

Solicitor for appellants: *Francis Howse.*

[PRIVY COUNCIL.]

J. C.* 1883 *March* 3.

PHILIP ESNOUF . . . . . APPELLANT;

AND

THE ATTORNEY-GENERAL FOR JERSEY RESPONDENT.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Practice—Criminal Cases—Special Leave to appeal—Order in Council of 13th May, 1572.

An order of Court directing a defendant to plead to an information (or other analogous proceeding) for libel, and directing that having pleaded he should be tried without a jury, is not a definitive sentence within the meaning of the Order in Council of 13th May, 1572. Special leave to appeal therefrom refused.

Quære, as to granting special leave to appeal in criminal cases in Jersey, or where there has been no definitive sentence.

THIS was a petition under the circumstances stated in the judgment of their Lordships for special leave to appeal from a decision of the full Court of Appeal of the Royal Court (Jan. 31, 1883), affirming decisions of the inferior number of the said Court (Oct. 28, 1882), or that the case might be inquired into by way of doléance.

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Davey, Q.C. (*Mulligan* with him), for the petitioner, contended that the decisions in question involved matters of great public importance, and that special leave should be granted. The effect of them was to deprive the petitioner of the preliminary inquiry before the stipendiary magistrate and subject him to an absolute procedure, which had been abolished by the Act of the States of the 23rd of March, 1863. They also deprived him of his right to trial by jury, which he was entitled to both under the old and the present procedures. Such decisions are final in a sense. Reference was made to *Belson* v. *Belson* (1); *In re Ames* (2); *Crédit Foncier of England* v. *Amy* (3); *Reg.* v. *Bertrand* (4).

The Attorney-General (*Sir H. James*) (with him *A. L. Smith*), for the respondent, opposed on the ground that the sentences were not definitive, and the proceeding was a criminal one.

The judgment of their Lordships was delivered by

LORD BLACKBURN :—

This is a petition for leave to appeal from the island of Jersey. By an Order in Council made as long ago as the reign of Queen Elizabeth—the 13th of May, 1572—it was directed "That no appeal in any cause or matter, great or small, be permitted or allowed before the same matter be fully examined and ended by definitive sentence or other judgment having the force or effect of a sentence definitive." That Order in Council of Queen Elizabeth was subsequently re-enacted, leaving out, however, the last line and a half, and it stands thus: "That no appeal in any cause or matter, great or small, be permitted or allowed before the same matter be fully examined and ended by definitive sentence"—leaving out the words "or other judgment having the force or effect of a sentence definitive." Their Lordships, however, do not think that the leaving out of those words really makes any difference.

Now the first question that arises in the case of an appeal from Jersey, before we consider whether the appeal is one which it would be proper to grant, is this, Has the time for granting the

(1) 7 Moore, P. C. 34.
(2) 3 Moore, P. C. 409.
(3) Law Rep. 6 P. C. 146.
(4) Law Rep. 1 P. C. 520.

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appeal come? Has it reached the position of being matter decided by a definitive sentence? Of course, whether an appeal should be granted at all in a criminal matter is quite a different question. The question whether leave to appeal should be granted must depend on the question whether the time has come for it, and whether the matter has been disposed of by a definitive sentence. It appears that the Criminal Court in Jersey, which would have general jurisdiction to try criminal matters, has in this case had the matter brought before them by what would be equivalent or analogous to an information of the Attorney-General in this country accusing the defendant of what is called the grave offence of having been guilty of libel. The Court, acting upon that, have caused him to be arrested and brought before them and held to bail. The first thing he has complained of is this. He maintained that the proceeding was altogether obsolete, as he said, and as his counsel repeatedly asserted, and moreover had been taken away by the Act of 1863, and that consequently he was not compelled to plead to it at all. The Court, of course, are capable of making a mistake; but they rightly or wrongly said that he must plead, that he was brought before them in such a way that according to the laws of Jersey he must plead, and he did plead. He pleaded Not guilty. The first point which he wishes to appeal against is this: he says that they ought not to have directed him to plead. Their Lordships must, in the first instance, see whether it can be said that the matter has ended in a definitive sentence. It seems pretty clear that the question whether or not he was guilty of this grave offence by the laws of Jersey was not ended by a definitive sentence, it was put in train to be tried by causing him to plead, but it has not gone further, and it seems therefore impossible to say that there was an end of the matter by a definitive sentence.

It seems to be agreed on all hands that if this had been a matter which had proceeded by arrest and bringing him before a stipendiary magistrate who had committed him for trial, then, primâ facie at least, the case would be tried by a jury. It seems to be agreed, or at all events asserted, that by the proceeding of information before the Court it is not so; and that the old practice would be, primâ facie at least, that the trial should be, not

before a jury, but before the Judges. On appeal, the High Court held that both the decisions of the Lower Court were right in holding that he ought to be made to plead, and further that having pleaded Not guilty he should be tried without a jury. The Court may have been wrong in their decision, but primâ facie, and until one sees the contrary, they are to be supposed to be right. The question comes to be this, Does that amount to a definitive sentence? Their Lordships do not think it does. There is a great deal more plausibility in this contention than there was in the other. It may very well be that in many offences, and perhaps in the case of libel more than in another case, a man may be convicted before a Judge who tries the case who would not be convicted before a jury. Their Lordships do not think he ought to be convicted before the one and not before the other, but it might make a considerable difference in the probability of his being convicted, and, therefore, it may be said that sending to the one tribunal instead of to the other, to decide a question of mixed fact and law, whether he was guilty or not guilty, would make a great difference in the final result; still their Lordships think they cannot say that that is a definitive sentence within the meaning of the words as they understand them to be used in this Order in Council.

It seems that the result is this, that the matter which is to be decided, viz., his guilt or innocence of a crime punishable by the laws of Jersey, is put in train to be decided by the decision of a Court sitting without a jury, instead of the decision of a jury; but in neither case is it finally decided until the verdict of the Court is given on the question which is thus remitted to them. Then the matter will have been finally decided; and then, and not till then, supposing there is no other objection to it, would be the time at which an appeal might be granted.

Then would arise the question of whether or not in criminal appeals at large, and in particular in Jersey, after the matters that have been stated before us, an appeal should be granted at all in a criminal case. As to that, their Lordships think that it would be premature to give any absolute decision. There are strong grounds for saying it would not be right to grant an appeal in a criminal case in Jersey, but at the same time their

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Lordships bear in mind what Baron Parke said at the end of *Ames' Case* (1). After saying that the law as to criminal appeals in Jersey had been brought to their notice, he says: "We are disposed to say that we ought not to have recommended Her Majesty to have allowed the appeal, but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of justice, and we are sitting here, not merely as a judicial body, but as Privy Councillors, and the matter of the former petition was referred to us generally. But we are fully aware of the difficulties which we should entail on ourselves if we were to grant appeals in matters of criminal prosecutions," and then he says that in that particular case they certainly ought not to have done it. Their Lordships now repeat that cautious language. We do not say that in no case whatever, even in an appeal from Jersey in a criminal matter, would it be the duty of this Board to advise Her Majesty to grant an appeal; we do not say under what circumstances it might be advisable so to advise Her Majesty, but we do say, repeating the language of Baron Parke used many years ago, that it should be done very cautiously, and after great consideration. We are by no means to be taken to say that we should grant it in this case if the party now petitioning were convicted and he were to apply for leave to appeal. At the same time it is not to be taken as the decision of their Lordships that they would not grant leave if there was a sufficient case put before them. Again, it is not to be supposed that their Lordships say, notwithstanding the rules that have been laid down, that leave is only to be granted with reference to a definitive matter, that never would Her Majesty be advised to grant an appeal under any circumstances, but that we must wait for the final disposal of the case. We do not say that never would it be done. That would be rash. All their Lordships do say is that it certainly should not be done in such a case as the present.

Their Lordships will accordingly report to Her Majesty that this petition should be dismissed.

Solicitors for the petitioner: *Saunders & Co.*

Solicitor for the respondent: *Solicitor to the Treasury.*

(1) 3 Moore, P. C. 409.

[PRIVY COUNCIL.]

HUTTON . . . . . PLAINTIFF;

AND

LIPPERT . . . . . DEFENDANT.

J. C.*
1883
March 14.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Cape of Good Hope Act 11 *of* 1863, *s.* 2—*Construction of Contract.*

Where a contract between the defendant and E. in terms purported to be one of guarantee or agency, the defendant guaranteeing the sale of E.'s property in whole or by lots at a fixed price, E. giving the defendant a power of attorney to deal with the property as he thinks fit, and agreeing that he should receive any surplus over and above the fixed price as his commission on and recompense for the said guarantee; but the real effect of the transaction was to give E. every right which a vendor could legally claim, and to confer on the defendant every right which a purchaser could legally demand:—

Held, that the defendant was liable to pay duty on his purchase-money under Act 11 of 1863, sect. 2.

APPEAL from a judgment of the Supreme Court (Oct. 12, 1881), which dismissed the appellant's action with costs. The Chief Justice dissented from the judgment.

The facts appear in the judgment of their Lordships.

The Attorney-General (*Sir H. James*), and *R. S. Wright*, for the appellant, contended that the transaction in question was a sale of the estate to the respondent within the meaning of Act 11 of 1863, sec. 2.

Davey, Q.C., and *Apsland*, for the respondent, contended that the section did not apply to the transaction. There was never a complete transfer of the property. Lippert remained an agent of the vendor: *Yorkshire Railway Wagon Company* v. *Maclure* (1).

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 19 Ch. D. 478; 21 Ch. D. 309.

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The sale was only a conditional one, and taxing Acts must be construed strictly: *Rein* v. *Lane* (1).

Counsel for the appellant were not called on to reply.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is a suit brought by Mr. Hutton, in his capacity as Treasurer-General of the colony of the Cape of Good Hope, to recover from the defendant a sum of £360, together with interest, which he declares to be due from the defendant under the provisions of Act 11 of 1863, of which provisions the following only are material:—Sect. 2. "For and in respect of every sale, whether private or public, made after this Act shall come into effect, of any freehold property or property held of Government upon quit-rent or other leasehold tenure, or of any opstal of a loan place, there shall be chargeable upon and payable by the purchaser a duty of four per cent. upon the price or purchase-money paid or to be paid for the said property." Sect. 3. "A duty as aforesaid shall be payable upon the value of any such property as aforesaid by every person becoming entitled to the same by way of exchange, donation, legacy, testamentary or other inheritance, or generally in any manner otherwise than through the medium or by the means of purchase and sale."

The declaration in the action contained two counts respectively relying upon these two clauses of the Act; but with respect to the second count no question now arises. The question arises solely upon the first count, which relies upon the second section of the Act; and the question is whether there was or was not a sale of a certain property from Ekstein to Lippert. The law of the Cape with respect to the contract of sale is thus stated by the Chief Justice: "Under our law, as under the Roman law, a sale may be defined as a contract in which one person promises to deliver a thing to another, who on his part promises to pay a certain price." In Van Leeuwen, cap. 17, section 1, is this passage: "The purchase is understood to be accomplished as soon

(1) Law Rep. 2 Q. B. 151.

as the price and the mutual condition has been fixed, although the money had not been paid, nor the delivery of the article made, unless a real misunderstanding had taken place in the articles sold." Mr. Justice Blackburn, in his treatise on the Contract of Sale, at p. 177, quotes Pothier thus: "In general a contract of sale is considered to have become perfect so soon as the parties are agreed upon the price for which the thing is to be sold. This rule has its operation when the sale is of an ascertained thing, and is pure and simple: Si id quod venierit appareat quid quale quantum sit et pretium et pure venit perfecta est emptio." It may be observed that, even if our law governed the case, which it does not, the definition given by Mr. Justice Blackburn in his treatise on the Contract of Sale, which is quoted by the Chief Justice, would apply.

Such being the law applicable, it remains to be seen what the real transaction between Ekstein and Lippert was. The Chief Justice quotes a passage from the Digest: "In emptis et venditis potius id quod actum quam id quod dictum sequendum est," a passage enunciating a principle which is probably common to the laws of all civilized countries.

We have, therefore, to look to what was the real transaction between the parties, and not to what they have called it. That transaction is contained in three documents, and it appears to their Lordships enough for the determination of this case to deal with those documents apart from any oral evidence which has been given. The first is an agreement of the 21st of September, 1880, which runs thus: "For the consideration after mentioned, Wilhelm August Lippert hereby guarantees to the said Dirk Gysbert Ekstein the sale, in whole or by lots," of an estate, describing it, "for the sum of £9000, by or before the 31st day of December, 1881: Wilhelm August Lippert to have the sole control and management of the aforesaid property and of the said sale or sales, and for that purpose the said Dirk Gysbert Ekstein shall grant unto him an irrevocable power of attorney, granting him the fullest power over the said property, so as to enable him to deal with it as he thinks fit, and Dirk Gysbert Ekstein shall be bound and obliged to pass the necessary transfer or transfers at the expense of the purchaser or purchasers. Wilhelm August

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Lippert also guarantees the payment of the interest at the rate of six per centum per annum, to commence from the 1st January, 1881, on the said sum of £9000, or so much thereof as shall remain from time to time due and owing; and he further guarantees, agrees, and undertakes that if the said ground is not sold in lots entirely or by lots, or if any part thereof shall remain unsold by the said 31st day of December, 1881, that he shall be bound himself to take over the said ground for the said sum of £9000, or any portion thereof remaining unsold at a proportionate value, so that the said Dirk Gysbert Ekstein shall receive the said sum of £9000 in full, with interest due. In consideration whereof it is hereby agreed that the said Dirk Gysbert Ekstein shall pay, and the said Wilhelm August Lippert shall receive or be entitled to account for the moneys coming into his hands, whatever surplus and balance shall remain after payment to the said Dirk Gysbert Ekstein of the said sum of £9000 and interest, as his commission on and recompense for said guarantee." On the 28th of the same month "it was further agreed that the proceeds of the sale shall be handed over to Ekstein on passing transfer until the whole amount of £9000 shall be paid." Then comes a power of attorney by which Ekstein nominates and appoints Lippert his lawful attorney to transfer all and singular the aforesaid estate, and so on, unto the various purchasers from time to time, and to give good and valid and effectual receipts, &c.

It thus appears that the price which Ekstein was to receive was ascertained, viz., £9000, and it was to be paid on the 31st of December, 1881, unless (and this appears to their Lordships to make no real difference in the transaction), some portions of it had been paid before, which portions were, if Lippert sold, as he might have done, but was not bound to do, to be paid over to Ekstein. As far as Ekstein was concerned, it appears to their Lordships that he sold the property. Now did Lippert buy it? Lippert obtained the complete control of it, not only such control as would have been necessary for him if he acted as agent, or guarantor (as it is here called), to sell portions of the property to other people, but the full possession and control of it. There could not be wider words than these: "deal with it as he thinks fit." Lippert might sell or let any portion of it, or he might

retain the whole in his own hands; he might cultivate it or let it run to waste; he might sell any portions of the woods and copse; in fact, he was, to all intents and purposes, the owner of it, and this in consideration of a fixed price to be paid on or before a fixed day.

Under these circumstances it appears to their Lordships that the Chief Justice was justified in saying that the effect of the transaction was to give Ekstein every right which a vendor could legally claim, and to confer upon the defendant every right which a purchaser could legally demand. Does it make any difference that the parties have called this transaction by the name of a guarantee? It appears to their Lordships that because the parties have used this term "guarantee" in a sense which is unusual and not applicable to this case,—for Lippert really guaranteed nothing,—the nature of the transaction is not thereby changed; and because they have said that Lippert was to be entitled to whatever surplus or balance shall remain on the resale of portions of the property, if any were resold, "as commission and recompense for the said guarantee," this expression does not convert him from a purchaser into an agent. The object of the parties seems to have been to obtain all the benefits of a sale, without subjecting themselves to the duty on it by giving a contract of sale the colour of a contract of guaranty or agency. Their Lordships agree with the Chief Justice that, notwithstanding these devices, the true character of the transaction sufficiently appears. They will humbly advise Her Majesty that the judgment of the Supreme Court of the Colony be reversed, and that the plaintiff do receive judgment for the amount which he claims. The plaintiff will have the costs in the Court below and the costs of this appeal.

Solicitors for the appellant: *Watney, Tilleard, & Co.*
Solicitors for the respondent: *Venning & Co.*

[PRIVY COUNCIL.]

J. C.* 1883 March 14, 15.

THOMAS EDWARD McELLISTER AND OTHERS . . . . . } DEFENDANTS;

AND

WILLIAM BIGGS AND OTHERS . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australian Act 22 *of* 1861, *s.* 39—*Unregistered Deed may pass an Equitable Right.*

Although an unregistered deed is not effectual to pass any interest in land under s. 39 of Act 22 of 1861, yet it is effectual to pass an equitable right to set aside a certificate of title relating thereto which has been obtained by fraud.

APPEAL from an order of the Supreme Court (July 27, 1880) dismissing an appeal from Gwynne, J., Primary Judge in Equity (Dec. 10, 1879).

The facts of the case appear in the judgment of their Lordships.

H. Matthews, Q.C., and *Strangways*, for the appellants.

Davey, Q.C., and *Hull*, for the respondents, were not called on.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the Supreme Court of South Australia which affirmed the decree of the Primary Judge of the same Court, in Equity, in a suit in which William Biggs and others were the plaintiffs and Thomas Edward McEllister and others were the defendants. The decree of the First Court was that Edward McEllister, under whom the defendants claim, not as purchasers or for valuable consideration, became registered

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

proprietor of the allotment No. 23, through fraud within the meaning of the Real Property Act of 1861, and that the certificates of the title registered in respect of that lot "were and are fraudulent and void as against George Guthrie and those claiming under him, and ought to be cancelled so far as regards the said allotment, except McKew's piece in the pleadings mentioned."

The Primary Judge also decreed that the Plaintiffs were entitled to the said allotment No. 23, except McKew's piece, and that "The certificates of title be delivered up to be cancelled and be cancelled accordingly; that the registration and entry in the said register book of the said transfer of the said allotment from Thomas Greaves Waterhouse and George Turline, in the pleadings mentioned, to the defendants Thomas Edward McEllister, Robert McEllister, and Susan Mary Gleeson, be cancelled; that the registrar-general of the said province cancel the said certificates of title and each of them, and the said registration and entry of the said transfer in the said register book; that the defendants be restrained by the order or injunction of this honourable Court from transferring, mortgaging, charging, encumbering, or otherwise dealing with, or joining or concurring in transferring, mortgaging, charging, encumbering, or otherwise dealing with, the said allotment No. 23, except McKew's piece or any part thereof."

Both the Lower Courts have delivered very clear and elaborate judgments, and it is unnecessary for their Lordships to reiterate the facts which are stated by the Judges of those Courts. They have found that Edward McEllister obtained the certificate of title as to lot No. 23, except as regards McKew's piece, by fraud. There are concurrent judgments upon that point, and their Lordships think that those judgments were warranted by the evidence. Guthrie obtained a judgment in ejectment against McEllister. Sect. 137 of the Colonial Act 22 of 1861 enacts that "Upon the recovery of any land, estate, or interest, by any proceeding at law or in equity from the person registered as proprietor thereof, it shall be lawful for the Court or Judge, in any case in which the proceeding is not hereinbefore expressly barred, to direct the registrar-general to cancel any certificate of title or other

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instrument or any entry or memorial in the register book relating to such land, and to substitute such certificate of title or entry as the circumstances of the case may require; and the registrar-general shall give effect to such order." The First Court, as already stated, upon the recovery in ejectment, ordered the certificate of title to McEllister as to lot No. 23, with the exception of McKew's piece, to be cancelled.

It was contended on the part of the appellants that the deeds under which the plaintiffs derived title from Guthrie, not having been registered in pursuance of sect. 39 of the Act to which allusion has already been made, passed no interest in the lands. That section enacts that "No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the estate or interest specified in such instrument shall pass." Their Lordships are of opinion that, although the deeds did not pass an interest in the land, still they passed to the plaintiffs the equitable right which Guthrie had to set aside the certificate of title to McEllister upon the ground of fraud. By sect. 114 it was provided that "Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner, or any previous registered owner of the estate or interest in question, is or was registered." But the case of fraud is excepted; and fraud has been found by both the Courts upon the evidence before them.

Then it was contended that the plaintiffs did not come under clause 4 of sect. 124. That clause enacts that "No action of ejectment or other action for the recovery of any land shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect to which he is so registered, except in any of the following cases." Then one of the cases excepted is "The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud." Guthrie was a person who fell within

that exception, and he therefore had a right to maintain the action of ejectment. Their Lordships are of opinion that, by reason of that judgment, the equitable right to rely upon which has been transferred to the present plaintiffs, they had a right to come into Court and ask to have the certificate of McEllister set aside upon the ground of fraud; and the Courts below, having found fraud, were right in decreeing for the plaintiffs that the certificate should be set aside.

A further objection was made by the learned counsel for the appellants to the form of decree, which orders the certificates of title to be delivered up to be cancelled and to be cancelled accordingly, but does not order the registrar-general to substitute such certificate of title or entry as the circumstances of the case might require. Sect. 137 says: "Upon the recovery of any land, estate, or interest by any proceeding at law or in equity from the person registered as proprietor thereof, it shall be lawful for the Court or Judge, in any case in which such proceeding is not hereinbefore expressly barred, to direct the registrar-general to cancel any certificate of title or other instrument, or any entry or memorial in the register book relating to such land, and to substitute such certificate of title or entry as the circumstances of the case may require, and the registrar-general shall give effect to such order." If when the decree of the Primary Judge was pronounced the objection had been made, the decree might have been rectified, but no such objection was then made, nor was it made on the appeal. Their Lordships, therefore, think that it is now too late for the Appellants to object to the form of the decree. When the decree is carried out and the certificates are delivered up to the registrar-general to be cancelled, and are cancelled accordingly, an application may be made to the registrar-general to obtain the proper certificates of title.

Under these circumstances, their Lordships think that the judgment of the Supreme Court was correct, and they will humbly advise Her Majesty to affirm that judgment. The appellants must pay the costs of this appeal.

Solicitor for appellants: *O. E. Dawson.*
Solicitors for respondents: *Johnston, Farquhar, & Leach.*

[PRIVY COUNCIL.]

J. C.* 1883 *Feb.* 28; *April* 4.

HENRY BARLOW WEBB . . . . . PLAINTIFF;

AND

HENRY B. WRIGHT . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT OF GRIQUALAND WEST.

Griqualand West—Indefeasible British Title—Conditions of Grant.

Held, that the plaintiff, who had obtained a judgment from the Land Court of Griqualand West in respect of certain lands, was entitled to the grant of an indefeasible British title thereto under the seal of the province in confirmation of the Presidential grant of the 3rd of December, 1862; and that he was not compellable to accept a title containing conditions not expressed in that grant, and not shewn to be incidents implied therein, nor to be duties or regulations since established concerning lands granted upon the like conditions.

Held, further, that he might reasonably object to the clause "that the issue of this title without the express reservation to Government of its rights to all precious stones, gold, or silver found on or under the surface of the said land shall in no degree prejudice the position of the Government in regard to the same."

Quære, whether the Civil Commissioner of the district was the proper officer to be sued in respect of title to lands in his district; but, *held*, that he as respondent could not by such objection defend the judgment which he had obtained or defeat an appeal therefrom.

APPEAL from a judgment of the High Court (Sept. 30, 1879), in an action which the appellant brought against the respondent in his official capacity as Civil Commissioner of the District of Kimberley. The appellant claimed that the respondent should be ordered to grant and issue to him an indefeasible British title under the seal of the province (i.e., the province of Griqualand West), to a farm "Alexandersfontein," upon the footing expressed in his summons and declaration.

The declaration and the facts of the case appear in the judgment of their Lordships.

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

The respondent admitted the appellant's right to the grant of a title, and the only question in dispute was as to the form in which such grant should be made.

Romer, Q.C., and *T. Northmore Lawrence*, for the appellant, contended that the grant should be on the basis of the Free State Presidential grant of December 3, 1862. The title tendered contained numerous and important conditions and reservations not contained in that grant. In particular it contained a reservation as to precious stones, &c., which appeared to assume that the Government had or might acquire rights in contravention of the ruling in *Webb* v. *Giddy* (1).

The Solicitor-General (Sir *F. Herschell*), and *Beaumont*, for the respondent, contended that the title as tendered was in accordance with the judgment of the Land Court, and such that the appellant was bound to accept it. Besides, the respondent was not the proper officer to be sued. His office is an administrative one of a local and subordinate nature within a particular district of the province. He has no authority to satisfy the demand made; the governor of the province was the proper defendant. Although the action was defended by Government that does not cure the defect: *Palmer* v. *Hutchinson* (2).

Romer, Q.C., replied.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

This is an appeal by the plaintiff below against the judgment of the High Court of Griqualand West.

The action in which this judgment was pronounced was commenced by a summons against George Hudson (for whom his successor in office, Henry Boscawen Wright, was afterward substituted), in his capacity as Civil Commissioner for the District of Kimberley, to answer Henry Barlow Webb, in his capacity as

(1) 3 App. Cas. 908. (2) 6 App. Cas. 619.

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the duly authorized agent and resident managing director of the London and South African Exploration Company, Limited, the plaintiff in this suit, in an action to compel him, the defendant, in his aforesaid capacity, to grant and issue to the said company an indefeasible British title under the seal of this province to the farm "Alexandersfontein," situate in the division of Kimberley, in terms of the judgment of His Honour Andries Stöckenstrom, Esq., Judge of the Land Court of this province, provisionally pronounced by him on the 16th of March, 1876, and, in the absence of an appeal, finally confirmed by him on the 16th of June then following.

The declaration concludes:

"Wherefore the plaintiff in his said capacity prays that this Honourable Court will, by its judgment, order the defendant in his said capacity forthwith to grant and issue to the said London and South African Exploration Company, Limited, an indefeasible British title under the seal of this province to the farm "Alexandersfontein," in terms of the judgment of the said Land Court, and on the basis of the said grant of His Honour James Allison, the Acting President of the Free State, whereon such judgment is founded and annexed hereto as aforesaid, and that the plaintiff, in his said capacity, may have such other and further relief in the premises as to this Honourable Court may seem meet, together with costs of suit."

It is convenient here to dispose of an objection to this appeal, not raised in the Courts below.

The statutable right which is given to those who have obtained a judgment in the Land Court is "to demand and receive from the Governor of the Province of Griqualand West, and under the seal of the said province," a title. It was said that the Civil Commissioner of Kimberley was not the officer on whom this duty was imposed, and that he had not, as far as appears, any control over either the Governor or the seal of the province, nor any authority from those who have such control, to appear on their behalf. In short, not only that there were defects in the declaration which might perhaps be amended, but also that the writ was

against the wrong party. Their Lordships do not express any opinion either one way or the other as to the validity of this objection if raised in the Court below either at an earlier stage of the proceedings or a later one, for they think that it cannot prevent the right of the plaintiff by appeal to try to get rid of the judgment which has been obtained by the defendant for the benefit of those who have the control of the affairs of the province, who would have been brought before the Court if the writ had been against the right party, whoever that may be. For not only did they appear in the name of the defendant and defend the action, but they have supported, and, even after making this objection, continue to support that judgment as a valid judgment against the plaintiff. And the plaintiff could not bring any new action whilst the present judgment stands, for if he did, and this judgment were pleaded against the plaintiff, it would scarcely lie in his mouth to say that the judgment was void because he had made a mistake as to the mode in which he had commenced the action.

Their Lordships therefore proceed to consider the question raised on its merits. It is one of considerable importance, as it appears that much land in Griqualand West is held on similar titles.

The present plaintiff had, shortly before this action was tried, brought an action against the Civil Commissioner of Kimberley in respect of a farm called Bultfontein. The judgment in that case was not the same as that now appealed against. Against it there was an appeal, which has been, for convenience sake, distinguished as *Webb* v. *Wright* No. 1, the appeal in the present case being *Webb* v. *Wright* No. 3. (There was another appeal, *Webb* v. *Wright* No. 2, which was dismissed by the Privy Council for non-prosecution.) The judgment of this Committee in *Webb* v. *Wright* No. 1 throws no light on the point now before their Lordships, but some of the documents printed at full length in the record of *Webb* v. *Wright* No. 1 are not printed at full length in the record in *Webb* v. *Wright* No. 3; instead of doing so, a reference is made to them as already printed in the record of *Webb* v. *Wright* No. 1.

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The evidence in the present case was very meagre. It appears as follows:—

"5th September, 1879.

"Mr. Advocate Hoskyns, with him Mr. Advocate Lange, of counsel for plaintiff. Attorney-General of counsel for defendant. Defendant pleads the general issue.

"William Pepperrell Hutton, sworn:—

"I am Master of the High Court, and also custodian of records in the late Land Court. I produce schedule, which was put in in Bultfontein case, marked A.

"Manuscript judgment delivered by judge, C, in Bultfontein case. I also produce original judgment paper, A 1. The document B 1 is the Presidential grant, which is referred to in the judgment, and which was filed in the Land Court. A sworn translation of the grant is attached to the summons.

"No cross-examination.

"Letter of demand same as in Bultfontein title. Reply 21st October. To be considered as part of record in the case.

"Plaintiff admits letter from Graham, 29th August, 1881, C 1. Reply 30th August, D 1. 5th September. Graham to plaintiff's attorney, G 1. Attorney-General puts in grant E 1, as tendered, also diagram F 1.

"Attorney-General calls no witnesses.—*Cur. adv. vult.*

"30th September, 1879.

"Mr. Advocate Hoskyns (with him Mr. Lange) of counsel for plaintiff. The Attorney-General of counsel for defendant."

Immediately after this statement follows the judgment now appealed against, which is in the following words:—

"Judgment for plaintiff.

"Title tendered to be title to be granted. Defendant to pay all costs incurred by plaintiff prior to date of tender of title. All costs incurred subsequent to date of tender to be paid by plaintiff."

The document marked A was an extract from the Government *Gazette*, dated Saturday, 4th December, 1875, containing a schedule of a very large number of "claims to land transmitted by

His Excellency the Governor to the Land Court of Griqualand West, in terms of Ordinance No. 3, 1875, sect. 15."

The schedule is divided into eight columns, with headings. The portion which relates to the present question is as follows :—

No.	Name of Claimant.	Division.	Name and Extent of Farm.	Foundation of Claim.	Grantor and Date of Grant.
365	London and South African Exploration Company.	Kimberley.	Alexandersfontein.	Purchase.	Orange Free State, 3rd Dec. 1862.

Grantee.	Seller, Date of Sale, and Purchase Amount.	
J. J. Coetzee	J. J. Coetzee, 22nd April, 1869, to P. R. and W. G. Well. 2. Well to L. & S. A. Ex. Company, 6th Dec. 1871.	Quit-rent.

The judgment of the Land Court is a very elaborate document, dealing with the claims which had been transmitted to the Land Court, rather more apparently than 1500 in number, and explaining why some were disallowed, but it contains nothing explanatory of the judgment given as to this claim, which is merely, "Name of claimant, London and South African Exploration Company; name of farm, Alexandersfontein. Allowed, 16th March, 1876."

Their Lordships do not doubt that this is a judgment entitling the party in whose favour it was pronounced to demand and receive from the governor of the province, and under the seal of the province, a title to the land. But the judgment of the Land Court does not in any way throw light on the question now in dispute, namely, what should be the effect of that title.

The Presidential grant, or rather the translation from the Dutch, is as follows :—

"A.

"No. 34. Book A, folio 50.

"Jacobsdal. W. C. No. 52, B. F.

"By his Excellency the President of the Orange Free State,

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in South Africa, in the name and on the behalf of the Government of the said State.

"Hereby is given and granted on perpetual quit-rent to Johannes Cornelius Coetzee certain farm or piece of land named 'Alexandersfontein,' land certificate No. 52, situate in the district of Bloemfontein, Field Cornetcy Onder Modder Rivier, in extent by guess 4,000 morgen, further fixed and bounded, as will appear in the annexed copy of Inspection Report, dated the 23rd of November, 1857, and the 6th of August, 1860, and fifty-nine, and subscribed to by C. A. S. Nanhaus, Ja. A. Serfontyn, P. S. N. Swaart, members of the Land Commission, with sketch annexed.

"This grant is made on condition that all roads passing over this land, or which may hereafter be made upon lawful authority, shall remain free and unhindered; that this land shall be subject to a public outspanning and pasture for the cattle of travellers, under such stipulations thereto as have already or may hereafter be made by the Legislature; that the said land shall be further subject to all duties and regulations as already are or may in future be established concerning land granted upon the like conditions; and finally that the owner shall be bound for the punctual payment of an annual quit-rent of the sum of £3 10*s.*; three pounds ten shillings, sterling.

"Given under my hand and the public seal of the Orange Free State, at Bloemfontein, on the third day of December, in the year of our Lord one thousand eight hundred and sixty-two.

"(Signed) J. ALLISON,

"Acting President of the Orange Free State.

"Registered at the office of the Registrar of Deeds, at Bloemfontein, on the third day of December eighteen hundred and sixty-two.

"WILLIAM COLLINS, Registrar of Deeds,
Orange Free State."

[*Here follow five indorsements of sales and mortgages.*]

The title tendered, which according to the judgment appealed against the plaintiffs are to take, is as follows:—

"In the name and on behalf of Her Majesty Queen Victoria, by the grace of God of the United Kingdom of Great Britain

and Ireland Queen, Defender of the Faith, and Empress of India.

"I do hereby grant on perpetual quit-rent unto the London and South African Exploration Company, their administrators or assigns, that certain plot or parcel of land known as 'Alexandersfontein,' and situated in Ward No. 1, in the division of Kimberley, being in extent five thousand seven hundred and eighty-eight morgen and square roods, or thereabouts, and bounded north by Bultfontein, south-west by Mauritzfontein, east by Karee Boom and the boundary of the province, and west by Spytfontein, as will more fully appear by the hereunto attached plan framed by the Government land surveyor, upon the following conditions, viz:—

"That the said London and South African Exploration Company, their administrators or assigns, shall punctually pay or cause to be paid, on the first day of January in each year, to the Civil Commissioner of the division wherein the said land now is or may hereinafter be situated, the sum of five pounds sixteen shillings sterling (£5 16s.). This quit-rent being payable from the first day of January, 1872, taking a receipt therefor, and paying all stamp duty required by law.

"That all roads and thoroughfares now existing on the said land shall remain free and uninterrupted, and that the Government reserves the right to make or cause to be made on or across the said land, for the public benefit, such roads, railways, railway stations, paths, aqueducts, dams, drains, reservoirs, watercourses, or other public works, as may be required, as also to conduct telegraphs over the said land, and to establish convenient outspans for the use of travellers.

"That the Government reserves also the right at all times to enter upon the said land, and to take, excavate, dig, or quarry all such stones, earth, gravel, or other materials as shall or may be required for any such public works, as in the preceding condition specified, without compensation to the proprietor, provided that compensation shall be made on such portions of said land as have been improved by cultivation, irrigation, or otherwise, and that all public officers employed by Government as surveyors, engineers, or the like, shall have the right to travel over and

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remain upon the said land, with their servants, horses, cattle, and equipages.

"That the land thus granted shall be brought into such a state of cultivation as it is or may be capable of, and that its owners shall have and keep its beacons, or landmarks and boundaries, properly erected and traced out.

"That the issue of this title without the express reservation to Government of its rights to all precious stones, gold, or silver found on or under the surface of the said land, shall in no degree prejudice the position of the said Government in regard to the same.

"And, lastly, that the said lands shall be subject to all such duties, rules, and regulations as either now are or may hereafter be in force with regard to lands granted on similar tenure, and also to any rights acquired by the Government or the public by reason of the creation of mining area or areas on the said land.

"Given under my hand and the public seal of the province of Griqualand West, at Kimberley, this fifth day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

"(Signed) CHARLES WARREN,
"Acting Administrator.
"By His Excellency's command.
"(Signed) FRANCIS H. S. ORPEN,
"Surveyor-General."

It is much to be lamented that the company did not put on record a draft of the title which they were willing to take. It would then have appeared what was the real question between the parties. Neither the Court below nor this Committee would have raised any objection to what both agreed upon; and possibly the points on which they differed might then have been raised in such a manner as to enable their Lordships to decide them finally. This has not been done; and their Lordships think that the plaintiff was to blame for this. The substantial question is whether the London and South African Exploration Company, Limited, are bound to accept a title expressed in such terms as that tendered.

That title in express terms makes some provisions which may

or may not be implied on the construction of the grant from the President of the Orange Free State, but are not expressly provided for therein. Their Lordships do not mean to say that it may not be shewn that those provisions may not be implied from the nature of the law existing in the Orange Free State at the time the grant was made, or from ordinances made after the grant and before the annexation of the territory by the British. But no such matters are stated. And, in the absence of any explanation, their Lordships think that the plaintiff company may reasonably object to the clause "that the issue of this title without the express reservation to Government of its rights to all precious stones, gold, or silver found on or under the surface of the said lands shall in no degree prejudice the position of the said Government in regard to the same," on the ground that it is likely to have some effect in prejudging the case of the London and South African Exploration Company, Limited, if hereafter the questions raised, and to some extent at least decided, in *Webb* v. *Giddy* (1), were again brought into litigation between them or their successors and the Government of the province.

Their Lordships think that the existence of one reasonable objection to the title tendered is enough to prevent them from affirming the judgment, whether that was really what the plaintiff objected to or not. From the reasons of the Judge it would seem that he did not understand this to be what the plaintiff objected to; but, owing to the plaintiff not having stated what the title was which he was willing to take, their Lordships cannot tell how this was.

Their Lordships have not before them the materials to enable them to frame a deed such that they could say that both parties should take it. That will be better done by the consent of both parties, as far as they can agree, and, in the first instance, by the Courts of the Cape on those points on which the parties cannot agree.

But their Lordships think that they ought to advise Her Majesty to declare,—

1. That upon the passing of the judgment of the Land Court of the 16th of June, 1871, in the pleadings mentioned, the

(1) 3 App. Cas. 908.

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London and South African Exploration Company, Limited, became entitled, and still are entitled to demand and receive from the Governor of the Province of Griqualand West, and under the seal of the said province, an indefeasible title to the lands adjudicated on the above-mentioned judgment.

2. That the title should be by a grant confirming the grant from the Orange Free State of the 3rd of December, 1862, by which the land shall be subject to all such duties and regulations as have been already established, either by the Orange Free State before the annexation, or by the British authorities since the annexation, or shall in future be established by the British authorities concerning lands granted upon the like conditions.
3. And inasmuch as it appears that the title tendered to the London and South African Exploration Company, Limited, as in the pleadings mentioned, and which, by the judgment appealed against, the company are required to accept, contains conditions which are not expressed in the said grant of the 3rd of December, 1862, and which have not been shewn to be incidents implied in that grant, nor to be duties or regulations since established concerning land granted upon the like conditions, the judgment above appealed against be reversed, and the cause remitted to the High Court of Griqualand, to do what is just and right in the premises, having regard to the above declarations, all other questions being reserved for the Court below.

Their Lordships will humbly advise Her Majesty accordingly. There should be no costs of this appeal.

Solicitors for plaintiff: *Sydney & Son.*
Solicitors for defendant: *Bircham & Co.*

[PRIVY COUNCIL.]

JOSEPH PHILLIPS AND OTHERS . . . . PROMOVENTS; J. C.*

AND 1883

THE HIGHLAND RAILWAY COMPANY . RESPONDENT. *March* 6, 7.

THE "FERRET."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF VICTORIA.

Vice-Admiralty Jurisdiction—Suit by six Seamen for Wages and Compensation—Orders in Council (2 *Will.* 4), *s.* 15—*Merchant Shipping Act*, 1854, *s.* 189.

By an Order in Council, sect. 15, passed in pursuance of 2 Will. 4, c. 51, the Vice-Admiralty Court has jurisdiction to entertain a suit brought by any number of seamen, not exceeding six, to recover their wages. The Merchant Shipping Act, 1854, sect. 189, does not take away such right of suit so long as the total aggregate amount claimed by such seamen exceeds £50.

Where in a suit brought by six seamen in the Vice-Admiralty Court, the Judge found that a total amount of £203 19*s.* 8*d.* was due to them, partly for wages and partly for wrongful dismissal, but that the amount due to each was less than £50: *Held*, that under the above rule and section the Judge was wrong in dismissing the suit for want of jurisdiction, and that a decree for £203 19*s.* 8*d.* should be made.

APPEAL from a judgment (Jan. 10, 1882) of the Vice-Admiralty Court in an action in rem, brought by the appellants as promovents against the *Ferret*, in which action the respondents as owners intervened and gave bail.

The action was brought according to the rules and regulations made by an Order in Council, dated the 27th of June, 1832, pursuant to the Act 2 Wm. 4, c. 51, which provides that in suits for mariners' wages the mariner may proceed against the ship, freight and master, or the ship and freight, or the owner, or the master alone, and any number of mariners, not exceeding six, may proceed jointly in one action.

The libel was brought on the 14th of October, 1881, and claimed sums varying from £80 to £110 each for wages, compen-

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

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sation for the promovents' detention at Melbourne, costs and expenses of their board and lodging there, and the costs of their return passage to a port of discharge in United Kingdom or continent of Europe.

The facts are stated in the judgment of their Lordships.

The Court dismissed the action without costs, on the ground that in the circumstances of the case the statute 17 & 18 Vict. c. 104, s. 189, was a bar to the action.

The material part of the judgment was as follows:—

"The suit was ad rem against the steamer *Ferret* by certain of the seamen, to recover wages alleged to be due to them, compensation for wrongful dismissal, and viaticum to England. In consequence of information received by the Government, the steamer had been seized by the officers of customs. The master and mate were arrested and the seamen removed from the vessel; some of the crew being kept under the surveillance of the police, as witnesses awaiting the trial of the master and mate. The seamen required as witnesses were paid by the Government, the others were placed in the Sailors' Home and offered a certain allowance. Several accepted this allowance and were engaged as seamen on board vessels in the port. The promoters refused the amount offered them and instituted the present proceedings.

"At the conclusion of the evidence in support of the allegations it was contended for the respondents that the Court possessed no power to entertain a question of damages or compensation for wrongful discharge, and that the amount on which the jurisdiction of the Court depended was that found to be actually due to each seaman and not to all the seamen collectively, but to each separately. To this contention the petitioners answered that the plea of tender had determined the question of jurisdiction, it was then too late to consider such an objection, and even if entertained, the interpretation put by the respondent on the statute 17 & 18 Vict. c. 104, s. 189, was erroneous. The first objection has already been decided. In *The Great Eastern* (1) a claim was entertained for compensation in the nature of damages for a wrongful discharge of seamen before the expiration of the term of

(1) Law Rep. 1 Ad. & E. 384.

agreement. So also in *The Blessing* (1) it was ruled by Sir Robert Phillimore, that the words in the statute, 'claim for wages,' included a claim for wrongful dismissal, apart from wages.

"With these decisions, especially in this jurisdiction, in which compensation may be regarded as in the light of wages earned, I have no hesitation in overruling this objection.

"The proper interpretation of the statute 17 & 18 Vict. c. 104, s. 189, involves a more difficult question. In *The Fairy Queen* (2) it was held that the action was barred by the statute 7 & 8 Vict. c. 112, s. 16. No doubt there the words used are not the same as in the subsequent enactment. The one, the earlier enactment, prohibits the institution of a suit for wages; the later, the institution of a suit for the recovery of wages by or on behalf of any seaman or apprentice, &c.; but the difference between the words in the earlier and the more recent enactment was caused apparently in order to avoid the difficulty pointed out by Mr. Baron Parke in *Hollingworth* v. *Palmer* (3). The Court is of course bound by the words used, not by the reason, if it were so, for which they were used. The subject matter of several suits by separate persons could not be united in one action at law, although several seamen may for special reasons sue for their wages in Courts of Admiralty. If this be so the restriction ought to be the same in all the Courts, for all are classed together, Admiralty and Common Law, &c. Were this restriction in derogation of Common Law rights the words ought to be construed strictly, but if the right of seamen to unite in one action the subject matter of several is confined to Courts of Admiralty the clause need not be so rigidly interpreted. Its construction presents some difficulty, but I think it is a bar to a suit even in the Admiralty jurisdiction, unless some one at least of the suitors establishes a claim to £50 when each one so establishing his right may recover.

"There remains the question of whether the plea of tender precluded the respondent from raising the question of jurisdiction. Some difficulty, I must be allowed to observe, is experienced in adjudicating in Admiralty suits at the present day in accordance with a procedure framed fifty years ago. Adhering, however, to

(1) 3 P. D. 35. (2) 3 Ir. Jur. 283.
(3) 4 Ex. 284.

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those rules, as must be done so long as they are in force, I think the course taken is justifiable. The plea is not (according to the observation of Willis, J., in *Rossi* v. *Grant* (1)) a plea to the jurisdiction, but a plea in bar. Dr. Lushington in *The Blakeney* (2) no doubt decided that 'an absolute appearance once made cannot be recalled, all objections to the jurisdiction must be taken on the earliest occasion,' but the same very learned Judge in *The Harriet* (3), evidently after appearance, held, expressly with regret, that the evidence shewed the claim for wages was barred as it did not amount to the minimum of £50. A similar construction is also put by text-writers of some repute, Williams and Bruce, Admiralty Jurisdiction, p. 176, note C, on the same statute. I think, therefore, the respondent was not precluded from raising the objection to the jurisdiction. For until all the evidence has been given the amount due on which the jurisdiction depends cannot be accurately ascertained."

Jeune, (*Wyke* with him), for the appellants, contended that the Court had jurisdiction to give judgment for the sums awarded by it to each of the appellants on one or other of the following grounds: (1.) That each of the appellants claimed a sum exceeding £50; (2.) That the total sum awarded to all exceeded £50; (3.) That it did not appear that the owner or any legal master of the ship resided within twenty miles of the place where the seamen were put ashore; (4.) That all suits for seamen's wages to any amount can be entertained by the Vice-Admiralty Court of Victoria.

Reference was made to *The Harriet* (3); *Rossi* v. *Grant* (1). With regard to the jurisdiction of Vice-Admiralty Courts to entertain suits of this description that has always been recognised; and at the present time there is universal jurisdiction of Admiralty and Vice-Admiralty Courts to deal with seamen's wages of any amount. 59 Geo. 3, c. 58, s. 1, gave to justices a summary jurisdiction where seamen claimed over £20; but this was concurrent with Admiralty jurisdiction. Then came 5 & 6 Will. 4, c. 19, ss. 15, 16, and 7 & 8 Vict. c. 112, s. 16, by the former of which

(1) 5 C. B. (N.S.) 701. (2) Sw. 428.
(3) 1 Lush, 291; 5 L. T. (N.S.) 210.

no costs were directed to be given to seamen in cases where they might have recovered before the justices, and by the latter of which suits for wages under £20 against the ship were prohibited except in certain specified cases; see also sect. 189 of the Merchant Shipping Act, 1854. Thus under the earlier legislation there was a concurrent jurisdiction, then came a limitation of it; while under the later legislation there is a return to the law as it stood under the earlier Acts, doing away with the limitation imposed on the Admiralty jurisdiction. See 24 Vict. c. 10, s. 10, which operates as a repeal in England of the Merchant Shipping Act, 1854, s. 189; 26 & 27 Vict. c. 24, s. 10. See Williams and Bruce's Admiralty Jurisdiction, p. 176; 30 & 31 Vict. c. 114, s. 33, which relates to Ireland; *Queen* v. *The Judge of the City of London Court* (1). This action is brought under rules which apply to the Vice-Admiralty Courts in the colonies under an Order of Council passed in pursuance of 2 Will. 4, c. 51, and dated the 27th of June, 1832. Sect. 189 does not take away the right to bring such suit so long as the total amount recovered exceeds £50. See *The Fairy Queen* (2); *Hollingworth* v. *Palmer* (3). As regards the construction of sect. 189, reference was made to the interpretation Act, 13 & 14 Vict. c. 21, s. 4. Words in the singular number include the plural unless it is found to be inconsistent with other parts of the Act.

As to Wright being substituted master, and resident, while in jail, within twenty miles of the place where the seamen were put ashore, he was not so in any sense of the word. The Admiralty law no doubt has gone very far in recognising substituted masters; see cases collected in Maclachlan on Shipping, p. 168. But the "integrity of the transaction," is always at the foundation of it, and a person who feloniously and forcibly takes possession of a ship is not so recognised. See *The Alexander* (4); *The Eliza Cornish* (5); *The Cynthia* (6).

[LORD BLACKBURN:—There are two points in the case: (1.) Whether the claims of the seamen could be added together so as

(1) 8 Q. B. D. 609.
(2) 3 Ir. Jur. 283.
(3) 4 Ex. 284.
(4) 1 Dod. Adm. 278.
(5) 17 Jur. 738.
(6) 16 Jur. 748.

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to give the Court jurisdiction; (2.) Whether there was a master of the ship against whom there could have been a remedy.]

Hollams (*Cohen*, Q.C., with him), for the respondents, contended that there had been a tender of all that was due to the seamen up to seizure. The Court ought to have found in favour of the amount tendered and no more. There was no power to give damages for wrongful dismissal or a breach of contract to employ, for the men had themselves broken the contract. [LORD BLACKBURN:—That is not in issue. It is not contended that the seamen have forfeited their wages.] If the wages due to a particular seaman are less than £50 he may go before the justices. Sect. 189 of the Merchant Shipping Act prevents him from suing in any Court of Record if the wages due are under £50. To read singular words as plural in the manner contended for would imply that but for the section seamen could lump their claims in any Court, which was not the case. And unless singular words are read as plural in sect. 189, several seamen cannot lump their claims together so as to go before the Vice-Admiralty Court with claims which each should have taken before the justices. The Legislature passed this section with the knowledge that, under the Vice-Admiralty rules, seamen could join their claims; and did so for the relief of shipowners. Neither the suit nor the decree is for a lump sum. The Court distributes to each the amount which each sues for and recovers, so that the case is within the exact words of the statute. It was then contended that the appellants were estopped from saying that Wright was not the master. The seamen could only recover on a quantum meruit: *Melville* v. *De Wolf* (1).

Counsel for the appellants were not called on to reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This was a suit brought by six seamen, in the Vice-Admiralty Court of Melbourne, to recover wages and compensation for wrongful dismissal. The suit was brought by the six seamen

(1) 4 E. & B. 844.

jointly, the amount claimed for each being a larger sum than £50; but the Judge reduced the amount due to each of the plaintiffs to a sum less than £50, the total, however, amounting to £203 19*s.* 8*d.*

The first question to be considered is whether the Judge had jurisdiction. That depends upon the 189th section of the Merchant Shipping Act of 1854. Previously to the passing of that Act His late Majesty King William IV., by an Order in Council made under the authority of an Act of Parliament passed in the second year of his reign, ordained certain rules and regulations to be acted upon by the Vice-Admiralty Courts abroad. One of those rules was contained in sect. 15. It stated that any number of seamen, not exceeding six, may join in one action in a Vice-Admiralty Court to recover their wages. It was, therefore, at the time of the passing of the Merchant Shipping Act of 1854, lawful for six seamen, if they pleased, to join in one action in the Vice-Admiralty Court to recover their wages; and compensation falls under that rule. The 188th section of that Act enacted that "Any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner before any two justices of the peace acting in or near the place at which the service has terminated, or at which the seamen or apprentice has been discharged, or at which any person upon whom the claim is made is or resides, for any amount of wages due to such seaman or apprentice, not exceeding £50 over and above the costs of any proceedings for the recovery thereof." Sect. 189, which is the section relied upon, enacted that "No suit or proceeding for the recovery of wages under the sum of £50 shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or any Court of Session in Scotland, or in any superior Court of Record in Her Majesty's dominions unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such Court as aforesaid, or unless any justices acting under the authority of this Act refer the case to be adjudged by such Court, or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." The question then is whether this

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enactment prevents several seamen from joining in one suit in a Vice-Admiralty Court to recover wages when the total amount of the wages claimed exceeds £50 and the wages of each is less than £50. Having reference to the interpretation Act (13 & 14 Vict. c. 21), which was in force when the Merchant Shipping Act of 1854 was passed, and by which it is enacted that words in the singular number shall include the plural, their Lordships are of opinion that they may read sect. 189 as if it had said "No suit or proceeding for the recovery of wages under the sum of £50 shall be instituted by or on behalf of any seaman or seamen."

It was contended that the section could not be read in that way, inasmuch as it speaks of actions brought in any of Her Majesty's Courts of Record, in which six seamen cannot join; but it does not follow that, because six seamen cannot join in a suit in one of Her Majesty's Courts of Record, they are not to join in a suit in the Vice-Admiralty Court under the provisions of the rules to which allusion has already been made. Their Lordships think that the 189th section must be read reddendo singula singulis, and that if six seamen join in a suit in a Vice-Admiralty Court, where six seamen may join, and the total amount of the wages due to the six exceeds £50, they may proceed in that suit although the wages of each included in the amount sought to be recovered are less than £50.

It was agreed that the Judge, instead of sending the matter to the registrar to assess the amount, should himself ascertain it; and he found with regard to each of the six that the wages and compensation due was a sum less than £50, but that the total amount due to the six was £203 19*s.* 8*d.* Their Lordships think that the Judge had jurisdiction, under the rule and the section to which allusion has already been made, to award that sum of £203 19*s.* 8*d.*, partly for wages and partly for wrongful dismissal.

In the first place, there was a contract entered into by Watkins, who was the duly authorized master of the owners at Cardiff. He entered into a contract with the seamen, and they were hired, at certain fixed amounts, for a period of three years, for a certain voyage. It appears that the master left the ship at the Cape, and that a man named Wright, who was then the mate, took possession and ran away with it for the purpose of stealing it.

When the ship arrived at Melbourne on the 22nd of April, in the year 1881, the Government seized it, on behalf of the owners, upon the ground that it was in the possession of men who had stolen it, and they put the seamen ashore. Three days afterwards, on the 25th of April, the ship was delivered up by the Government to the agent of the owners. The agent took possession, and the owners must be bound by his act; by taking possession of the ship they ratified what the Government had done in taking possession of it on their behalf and putting the seamen ashore.

The seamen contended that they were entitled not only to their wages up to the time of the seizure, but to compensation for being turned out of the ship after it arrived at Melbourne. If the seamen had been participes criminis, if they had joined Wright in endeavouring to steal the ship, of course they would not have been entitled either to wages or to compensation; but that defence was never made. The seamen, although they were at first arrested, were never tried for the offence of complicity. They were discharged, and no defence was set up in the suit in the Vice-Admiralty Court that the plaintiffs were not entitled to their wages upon the ground of complicity. A sum, not including compensation, was tendered to them for their wages up to the date of the seizure of the ship. Nothing was offered by way of compensation for the wrongful dismissal. The learned Judge who tried the case said: "In consequence of information received by the Government, the steamer had been seized by the officers of customs. The master and mate were arrested, and the seamen removed from the vessel, some of the crew being kept under the surveillance of the police as witnesses awaiting the trial of the master and mate. The seamen required as witnesses were paid by the Government; the others were placed in the Sailors' Home, and offered a certain allowance. Several accepted this allowance, and were engaged as seamen on board vessels in the port. The promoters refused the amount offered them, and instituted the present proceedings."

Their Lordships are of opinion that under the circumstances (no defence having been set up that the plaintiffs were guilty of complicity), they were entitled to recover their wages and a

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reasonable and proper amount for compensation. The Judge fixed the amount which he would have awarded if he had had jurisdiction at £203 19*s.* 8*d.*, but he dismissed the suit upon the ground that he had no jurisdiction, inasmuch as the suit was for wages under the amount of £50. Their Lordships ought to give the same judgment as the Judge would have given if he had considered that he had jurisdiction, and had referred it to the registrar to assess the amount, and the registrar had fixed it at £203 19*s.* 8*d.* and the Judge had confirmed the report of the registrar.

Several other points were made, and amongst others that Wright was the substituted master, notwithstanding he took the command after Watkins left for the purpose of stealing the ship; and that although in jail for stealing the ship, he was residing within twenty miles of the place where the seamen were discharged within the meaning of the 189th section. Their Lordships consider that the point on which the judgment has already been pronounced is sufficient to decide the case, and that it is not necessary to express an opinion upon the other points.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the Judge be reversed, and that, instead thereof, a decree be given in the suit for the plaintiffs for the sum of £203 19*s.* 8*d.*, to be distributed amongst the several plaintiffs in the manner in which the learned Judge has divided the total amount amongst them, with costs, in the Lower Court. The respondents must pay the costs of this appeal.

Solicitor for appellants: *J. Sheldon Hepworth.*
Solicitors for respondent: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

JOHN MEWS AND JONAH OASTLER . . APPELLANTS; AND THE QUEEN . . . . . RESPONDENT.

H. L. (E.) 1882 Dec. 13.

Criminal Lunatic, Maintenance of—Prisoner, Maintenance of—3 & 4 *Vict. c.* 54 *s.* 2—27 & 28 *Vict. c.* 29 *s.* 2—*Prison Act* 1877 (40 & 41 *Vict. c.* 21) *ss.* 4, 57.

When a pauper prisoner without a settlement becomes insane during confinement in a prison to which the Prison Act 1877 (40 & 41 Vict. c. 21) applies, the expenses of inquiring into his insanity and of removing him to a county lunatic asylum and of his maintenance in such asylum during the currency of his sentence are, by sects. 4 and 57 of that Act, to be defrayed out of moneys provided by Parliament; and the effect of those sections is to repeal the provisions of 3 & 4 Vict. c. 54 s. 2 which made the county liable.

So *Held* reversing the decision of the Court of Appeal.

APPEAL from an order of the Court of Appeal (Lord Selborne L.C. Lord Coleridge C.J., and Brett L.J.) affirming an order of the Queen's Bench Division (Denman J. and Pollock B.).

The facts are set out in the report of the decision below (1), and in the judgment of Lord Blackburn in this House, post p. 341.

The Prison Act 1877 (40 & 41 Vict. c. 21) s. 4, is as follows:—"On and after the commencement of this Act all expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament."

Sect. 57: "A 'prisoner' for the purposes of this Act means any person committed to prison on remand or for trial, safe custody, punishment, or otherwise, and 'the maintenance of a prisoner' includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been

(1) 6 Q. B. D. 47.

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payable by a prison authority, with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed."

Dec. 6, 7. Sir *F. Herschell* S.G. and *E. Baggallay* for the appellants :—

Under 3 & 4 Vict. c. 54 ss. 1, 2 in such a case as the present the county would be liable; and before 1877 the county was equally liable whether the prisoner became insane or not. The prisoner was removed under 27 & 28 Vict. c. 29 s. 2, which Act repeals sect. 1 of 3 & 4 Vict. c. 54, preserving the rest. Therefore this case is under 3 & 4 Vict. c. 54 s. 2 and 27 & 28 Vict. c. 29 s. 2, and the Prison Act 1877 of which ss. 4, 57, impliedly repeal the previous enactments as to such expenses. Before the Prison Act 1877 pauper lunatics were chargeable, if their settlements were known, to the union of settlement, and if the settlement were unknown, to the county where they were found wandering. (1.) But for the Prison Act 1877 the expenses of the maintenance of a prisoner would have been payable by the prison authority; (2.) under that Act they are to be paid out of the Consolidated Fund though there is no reference to previous Acts and no repeal of them; (3.) sect. 57 of the Prison Act 1877 extends to expenses incurred at a time when the person was not a prisoner, or is not limited to expenses incurred at a time when he was a prisoner. For these three propositions *Mullins* v. *Treasurer of Surrey* (1) is an authority. As to expenses after the prisoner has left prison see *Prison Commissioners* v. *Corporation of Liverpool* (2). If a prisoner recovers his sanity he will go back to prison under an order of removal of the Home Secretary, but the original warrant of commitment remains in force and it is by virtue of that that he is in prison after recovery of sanity. Therefore "prisoner" includes the present case.

Sir *H. James* A.G. and *Poland* (*A. L. Smith* with them) for the respondent:—

The decision below was right and for the reasons there given.

(1) 7 App. Cas. 1.

(2) 5 Q. B. D. 332.

The scope of the Prison Act 1877 was to make over furniture &c. of prisons (sect. 5) to the Secretary of State, and see sect. 48. This Act does not include convict prisons, but county prisons only; and "prison" means a local in distinction to a convict prison. Prisoners were originally not liable to maintain themselves: most offences were felonies and the property of convict felons was forfeited to the Crown. There was no liability on the county till justices made an order. A criminal lunatic might be sent to a private asylum by the Home Secretary and no provision is made for payment of the proprietor. The order may be made on the county even after the termination of the imprisonment: *Bradford Union* v. *Wilts* (1).

Sir *F. Herschell*, S.G. in reply referred to 1 *Russell* on Crimes p. 581, 5th ed. as to prisoners escaping, and 23 & 24 Vict. c. 75 s. 12.

The House took time for consideration.

Dec. 13, 1882. LORD BLACKBURN:—

My Lords, a rule was obtained for a mandamus to the appellants, two justices of the county of Surrey, commanding them to proceed to hear and determine, pursuant to the statutes in that behalf, the matter of an application for an order on the treasurer of the county of Surrey for the maintenance of Mary Bray, a lunatic confined in the Surrey Lunatic Asylum.

Mary Bray was convicted of felony in 1879, and was sentenced to imprisonment in the House of Correction at Wandsworth in the county of Surrey. Whilst undergoing her sentence she became insane and was by order of the Secretary of State, made under the provisions of 27 & 28 Vict. c. 29, amending 3 & 4 Vict. c. 54, removed from the prison to the county lunatic asylum.

Mary Bray had no settlement in England and no property applicable to her maintenance. The provision in the 2nd section of 3 & 4 Vict. c. 54, is that in such a case "two justices shall make an order upon the treasurer of the county, city, borough or place where such person shall have been imprisoned,"

(1) Law Rep. 3 Q. B. 604.

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to pay "all reasonable charges for inquiring into such person's insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to pay such weekly sum as they or any two such justices shall by writing under their hands from time to time direct for his or her maintenance in such asylum or receptacle in which he or she shall be confined."

The appellants did not dispute that they were bound to make the order unless the Prison Act 1877 made a difference. They maintained that by that Act those expenses were to be defrayed out of moneys to be provided by Parliament. And if they were right in this contention it necessarily followed that they were no longer to make an order on the treasurer of the county to pay those expenses, that portion of the Act of 3 & 4 Vict. being abrogated by subsequent inconsistent legislation, though the Act was not repealed.

The answer to the question thus raised depends on the construction of a very ill-penned Act (40 & 41 Vict. c. 21), and chiefly upon that of two sections, the 4th and 57th.

The Queen's Bench Division made the rule absolute, and the Court of Appeal affirmed their decision on the 8th of November 1880 giving a very short judgment (1). Shortly afterwards, on the 7th of December 1880, the case of *Mullins* v. *Treasurer of Surrey* (2) came before the Court of Appeal, and in that case an elaborate judgment was pronounced as to the construction of the Prison Act 1877 with reference to expenses of a different kind, which it was held were no longer to be borne by the treasurer of the county, and that was affirmed in this House (3). The Court of Appeal had no power to overrule the decision in *The Queen* v. *Mews* (1), and as two of the members of the Court were the same, I think they cannot have forgotten their former decision, and must have thought that the two decisions could well stand together, but they do not explain how they were different. In this House *The Queen* v. *Mews* (1) was not cited or considered at all.

Now when the question comes to be decided I think (not

(1) 6 Q. B. D. 47. (2) 6 Q. B. D. 156.
(3) 7 App. Cas. 1.

certainly without great doubt and difficulty, but with as much certainty as can ever be felt in construing such draftsmanship as that in 40 & 41 Vict. c. 21) that the meaning of the enactment is what the appellants contend for, and consequently that the rule should have been discharged, and therefore that this appeal must be allowed.

I think that the decision in *Mullins* v. *Treasurer of Surrey* (1) decides that, notwithstanding the very awkward way in which the word "therein" is inserted in sect. 4, the enactment is not confined to the maintenance of prisoners whilst actually in the prison, and further that when it is established that the expenses are such as fall within the description of maintenance of a prisoner as defined in sect. 57 they are brought within the phrase "as would if this Act had not passed have been payable by a prison authority," if they were such as would have been payable by the treasurer of the place to which the prison belonged and for which the prison authority acted. And consequently if the expenses now in question are within the definition of "maintenance of a prisoner," they were formerly payable by the prison authority.

The question therefore is, as it seems to me, reduced to this: whether the lunatic, still detained under her sentence and not entitled to her discharge though she become sane, but relieved from suffering punishment while she is insane, is within the meaning of sect. 57 a "prisoner" in "custody" and in a "place of confinement." I do not doubt that in the ordinary sense of the words all these things are true of her case. This is fortified by the language of 27 & 28 Vict. c. 29 s. 2 where such a lunatic is spoken of as being in custody, but I put no more stress on this than as shewing that such is the natural language to use in such a case.

I therefore move that this appeal be allowed, and that the order appealed against, affirming the order of the Queen's Bench Division that a writ of mandamus should issue, and the order of the Queen's Bench Division, be reversed, and that the rule obtained for the issue of that writ be discharged, and that the

(1) 7 App. Cas. 1.

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respondent do pay the costs of this appeal and the costs in the Courts below.

LORD WATSON:—

My Lords, I need not recapitulate the facts of this case, seeing that they are not in dispute and have already been stated to your Lordships. They give rise to a question of considerable nicety touching the construction of sects. 4 and 57 of the Prison Act 1877.

Before the passing of that Act the cost of inquiring into the insanity of a person undergoing sentence in a county prison, and of conveying her thence to the county lunatic asylum, and of maintaining her there during the currency of her sentence, in terms of the Acts 3 & 4 Vict. c. 54, and 27 & 28 Vict. c. 29, were, in all cases where the prisoner had no available means and no known settlement, payable by the treasurer of the county. The statutory liability thus imposed upon the county treasurer, which ultimately rested upon the justices of the peace for the county in quarter sessions, has, the appellants contend, been transferred to the public exchequer by the 4th and 57th sections of the recent Prison Act. In order to make good their contention the appellants must satisfy your Lordships not only that the costs in question are expenses incurred in the maintenance of a prisoner within the meaning of these two clauses, but also that before the Prison Act became law they were payable by the prison authority.

The judgment of this House in *Mullins* v. *Treasurer of Surrey* (1), though by no means decisive of the present case, aids so far the argument of the appellants. According to my understanding it determined these two points:—(1.) that the word "committal," in sect. 57, signifies the act of the magistrate who issues the warrant of committal, and not the act of the officer who executes it by delivering the person therein named into the custody of the gaoler; and (2.) that the expression "prison authority," occurring in the same section, does not mean a "prison authority" acting in execution of the Prison Act of 1865, but a prison authority as defined in the interpretation

(1) 7 App. Cas. 1.

clause of that Act, or in other words the justices in quarter sessions assembled. It humbly appears to me that each of the points so decided by this House has a material bearing upon the general construction of these clauses. From the first of them it necessarily follows, in my opinion, that sect. 57 is definitive of and will therefore override the language used in sect. 4; and consequently that the Treasury may have to bear the expense of maintaining a person who is a "prisoner," according to a reasonable construction of sect. 57, but who is not a "prisoner therein" (i.e. in the prison) within the meaning of sect. 4. And I think it is the necessary consequence of the second that the Treasury must bear all expenses for which the justices in quarter sessions were previously liable, provided that such expenses are incurred in maintaining, within the meaning of sect. 57, a person who is a "prisoner" within the meaning of that section.

In that view the controversy between the parties is narrowed by the judgment in *Mullins* v. *Treasurer of Surrey* (1) to the question, Was Mary Bray, at the time when her insanity was made the subject of inquiry within the prison at Wandsworth, or whilst she was being removed to the county lunatic asylum, or during her detention there, a "prisoner" within the meaning of sect. 57?

I see no reason to doubt that Mary Bray, being actually in confinement within the walls of the prison at the time when her mental condition was inquired into, was a prisoner for whose maintenance the Treasury and not the old prison authority was liable; and I am inclined to think that such an inquiry is as much a part of the maintenance of the prisoner as calling in a physician to prescribe for her bodily ailments. I am also disposed to hold that, apart from all other considerations, the Treasury would be liable for the cost of carrying her to the lunatic asylum, because she remained a prisoner in the custody of the new prison authority until she was placed by the prison officials in charge of the manager of the asylum. But the substantial controversy between the parties relates to the position of Mary Bray after she became an inmate of the asylum. It is argued for the respondent

(1) 7 App. Cas. 1.

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that she thereupon ceased to be a prisoner in any sense whatever and became a mere pauper inmate; whilst the appellants maintain that during the whole period of her sentence she continued to be, notwithstanding her treatment in the asylum, an insane prisoner, but still a prisoner within the meaning of the Act of 1877.

If regard were had solely to the provisions of the Prison Act 1877 I confess I should have difficulty in deciding which of these arguments ought to prevail. On the one hand Mary Bray was not a prisoner in this sense, that she was detained, in a place which was not a prison, under a legal warrant directing that she should be taken out of prison and treated as a patient in the asylum. On the other hand she remained a prisoner in this sense, that she was under a sentence of imprisonment still current, and that her residence in the asylum counted as satisfaction of the sentence just as if she had actually been in prison. That might not suffice to bring her as a prisoner within the scope of sect. 4 if that clause stood alone. But as I have already had occasion to observe sect. 4 is qualified by sect. 57, which was enacted for the very purpose of explaining what the Legislature meant by the words "maintenance," "prisons," and "prisoners," as used in the other clauses of the Act. I can find nothing in sect. 57 which throws a direct light upon the condition of a prisoner who has been removed for the sake of treatment to a lunatic asylum, but it does describe prisoners to be maintained by the Treasury in terms of the Act as persons liable to "removal from one place of confinement to another"; and these expressions are in my opinion of the greatest importance when read in connection with the Acts 3 & 4 Vict. c. 54 and 27 & 28 Vict. c. 29, both of which are statutes professedly dealing with the case of insane prisoners, that is of persons under sentence who become insane during their incarceration.

The first of these Acts, which not only makes provision for the removal to an asylum of prisoners who become insane, but imposes upon the county treasurer the cost of inquiry as to the mental state of prisoners in the position of Mary Bray, as well as of their removal to the asylum and maintenance therein, expressly declares (sect. 1) that the insane person when removed under a proper

warrant "shall remain under confinement in such county asylum." The Act 27 & 28 Vict. c. 29 leaves untouched the liabilities for expenses of inquiry, removal, and maintenance created by the previous statute, but alters the procedure necessary with a view to the removal of insane prisoners. The 2nd section, after providing a new method of procedure, enacts and declares that "every person so removed under this Act, or already removed and in custody under any former Act relating to insane prisoners not under civil process, shall remain in confinement in such lunatic asylum." These enactments to my mind make it clear to demonstration that the Legislature in making provision for the curative treatment of insane prisoners did not contemplate that they should cease to be prisoners when removed to an asylum, but on the contrary did contemplate and intend that they should still be regarded as prisoners in custody, and that in a proper place of confinement.

Turning again to the Prison Act of 1877 I feel bound to assume that the framers of that statute had in view not only the possibility that prisoners might become insane under the new régime, as they had done under the old, but also the fact that statutory provisions had already been made for such persons in terms plainly implying that they were still to remain prisoners notwithstanding their removal from the prison to the asylum. And it appears to me upon that assumption that an insane person under sentence of imprisonment, so long as she remains in custody in that which the law recognises as a proper place of confinement, is a prisoner in the sense in which that word is used in sect. 57 of the Prison Act. I therefore agree in thinking that the judgment appealed against ought to be reversed.

I have only to add that I have had the less hesitation in differing from the very learned judges who constituted the Court of Appeal, because I am satisfied that the arguments addressed to that Court in support of the appellants' case were not the same as those which have been so ably pressed by counsel at the bar of this House. Brett L.J. says that the appellants' argument when seen through was to the effect that the 2nd section of 3 & 4 Vict. c. 54 "was part of a code which has been repealed by the Act of

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1877"; and I do not infer from the opinions of the two noble and learned Lords who aided in the decision of the case that they had in view the points submitted for your Lordships' consideration. Had no other argument than that been submitted on behalf of the appellants I should have been prepared to reject it. The Act of 1877 does not either expressly or by implication repeal the code established by Insane Prisoners Acts; it merely varies that code by substituting in a certain case the liability of the Treasury for that of the old prison authority.

LORD BRAMWELL:—

My Lords, if I thought that the consideration on which I have founded my opinion in this case had been present to the minds of those whose judgment is appealed from, I should entertain the greatest doubt as to the soundness of that opinion. As it is, I am, with great hope that I am right, compelled to say that I cannot agree with that judgment. I advise your Lordships to allow this appeal.

One would think that when the local prisons were taken from the prison authorities they would be relieved of their expense. No doubt it might have been otherwise provided, but one would certainly suppose that, if the bulk of those expenses was undertaken by the State, the whole would be, and I am at a loss to see why the expense of a criminal pauper lunatic, and no other, should continue to be borne by the prison authorities. It seems to me that the legislature has enacted what, as I say, I should expect, because it seems to me that the words in sect. 57, "or otherwise," are not to be read in connection with "place of confinement," but generally with the whole sentence,—thus, expenses of "food &c., or otherwise."

I think so as a mere matter of construction, but I think so also because otherwise many expenses, which doubtless are to be borne by funds to be provided by Parliament, are not provided for, the doctor and medicines, burial, the chaplain, materials for prisoners to work on, tools, &c. If so, there seems no difficulty in saying that the expenses now in question are within the enactment, because it is clear by the interpretation clause, and has

been decided by this House, that "prisoner" does not exclusively mean a person who at the time spoken of is in prison, but it means a prisoner as interpreted, viz.: a person who has been committed, &c. I should come to the same conclusion if the words "or otherwise" were limited to a "place of confinement," for, as I have said, this lunatic is a "prisoner," as interpreted. Then, as to the first item, viz. the expense of the inquiry as to the prisoner's sanity, I think the argument of the Solicitor-General irresistible, viz., that if the prisoner is not found a lunatic the expense of the inquiry must be borne by the Consolidated Fund, and it cannot have been intended otherwise when the prisoner is so found. Then the conveyance is clearly to a place of confinement, "or otherwise," if those words are so limited, and the food is undoubtedly within sect. 57.

What is the objection to this? It is said that it would be piecemeal legislation. Now, to my mind that is precisely what it is not; on the contrary, the construction of the Crown makes piecemeal legislation. On the construction I submit, the Legislature has dealt with *all* expenses to which the prison authority *as such* is liable. It has not dealt with all cases of lunatics, nor with all county expenses, because the subject matter of the legislation was not lunatics generally, nor county expenses, but prisons.

But then some objection is taken, which I honestly confess I do not understand, to the effect that there will be no machinery for getting these expenses from the estate of the lunatic or his parish, and that a petition of right against the Crown will be necessary to get the expenses which may be incurred. I cannot see that the machinery which existed before will not continue. If not, so much the worse for the Consolidated Fund. It is not a reason for misconstruing the Act.

As to the petition of right objection, it is not practical. The Secretary of State will do his duty or will have to pay ready money. Moreover, your Lordships have already disregarded this objection.

As to the judgments delivered in the Courts below, I think it right to make some respectful comments. It is said that this is

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not strictly an expense paid by the justices as a prison authority because "it is an expense not incurred in the prison or by persons who are being treated in prisons." But with submission, if I am right in my application of the interpretation clause as to a prisoner, the statute is not limited to expenses incurred *in* a prison. It is said that the Act of 1877 is not inconsistent with the prior Act, and that it is still in force; but with submission this is to beg the question. If it provides for a new mode of paying this expense it abrogates the former, on the well-known principle. To say that the statute deals with the whole question of prisons and prisoners, leaving the criminal lunatics aside, is really to say that it does not deal with the whole question of prisoners, as it omits to deal with lunatic prisoners. With great respect I think it is unreasonable to read the statute of 1877 as applicable only to the case of prisoners who remain sane. Its language is comprehensive enough to include all prisoners, and, if I am right, the reason of the thing is that it should do so. In the Queen's Bench Division the decision proceeded mainly on the ground that the lunatic was not a prisoner. On this I have already expressed my opinion. I advise your Lordships to allow this appeal.

LORD FITZGERALD:—

My Lords, I concur in the opinion that the decision of the Court of Appeal should be reversed, and that the rule absolute for a mandamus should be discharged. I have come to that conclusion with great diffidence, having regard to the very high authority of the tribunal from whose decision this appeal immediately comes.

It is not my intention to deal with the expenses of the inquiry as to the insanity of Mary Bray, or the cost of her conveyance from the county prison to the lunatic asylum. I confine myself to the real question between the parties as to the cost of her maintenance in the asylum during the currency of the two sentences of imprisonment passed upon her.

There can be no doubt that as she had no settlement and no property the cost of her maintenance would have been payable

out of the county rates, under the provisions contained in sect. 2 of 3 & 4 Vict. c. 54, if it had not been for the Prison Act of 1877. The question is whether the effect of the later statute has been to vary the former to the extent of making the cost of such maintenance ultimately payable out of moneys provided by Parliament in place of the county fund.

The expressed policy and object of the Prison Act of 1877 was to take from the existing prison authorities and the justices at sessions all powers and jurisdiction, whether at common law or by statute or charter, vested in them as to prisons and prisoners, and to transfer such powers and jurisdiction, together with the prisons and their management, and the control and safe custody of the prisoners, to Her Majesty's Principal Secretary of State aided by the commissioners and officers to be appointed in manner provided by the Act. On the other hand the county is relieved from the obligation to maintain a prison and to provide prison accommodation, and the maintenance of prisons and prisoners is placed on the public funds in exoneration of the county rates.

But though such were the general objects of the Legislature, what we have to consider and determine is whether the expenses of maintaining insane prisoners in lunatic asylums under such a state of facts as the present case discloses are provided for by sect. 4 of the Act, as amplified and defined by the 57th section. If the case stood on sect. 4 alone, that section would be subject to all the observations of the judges in the Queen's Bench Division and in the Court of Appeal; but it seems that attention was not sufficiently directed to sect. 57.

One principal question then arises on sect. 4 as interpreted by sect. 57, namely, whether Mary Bray when detained in the lunatic asylum, and before the expiration of her sentence, continued to be a prisoner within the meaning of sect. 4. Upon the fullest consideration I have come to the conclusion that she was such a prisoner, notwithstanding the difficulty created by the word "therein" in sect. 4.

Before her removal to the asylum she was a prisoner in the county prison undergoing sentence, and the statutes under which she was removed declare that the person so removed

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"shall remain under confinement in such county asylum" until it shall be certified that such person has become sane, "and thereupon if such person shall still remain subject to be continued in custody" (3 & 4 Vict. c. 54, s. 1, and 27 & 28 Vict. c. 29, s. 2) "such person shall be removed back to the prison or other place of confinement from whence he or she shall have been taken, or if the period of imprisonment of such person shall have expired he or she shall be discharged."

A prisoner is but a captive detained in some place of confinement for some one of the objects mentioned in the statute, and that was the position of Mary Bray whilst in the lunatic asylum during the currency of her sentence, and she was not the less a prisoner though not subject there to any punitive treatment save detention in custody. Being so a prisoner her maintenance in that place of confinement would have been payable by the prison authority but for the passing of the Prison Act 1877, and I am of opinion that by the operation of that Act such maintenance is now payable out of moneys provided by Parliament. There seems to have been in the decision of the Court below too strict an adherence to the letter of sect. 4, without regarding the object to be attained and the subject matter as explained by sect. 57.

I desire to say that I have not formed my opinion on this question of liability to the maintenance of this insane prisoner on the case of *Mullins* v. *Treasurer of Surrey* (1) or on any rule or principle supposed to be deduced from it; and I have to add that the present decision of your Lordships' House seems to me to leave untouched another question which may arise, and possibly has arisen in Mary Bray's case, namely, the liability to her maintenance in the lunatic asylum after the periods of imprisonment to which she was sentenced had expired, and when it may be contended that she ceased to be a prisoner, and was relegated to the class of pauper lunatics.

Order of the Court of Appeal and order of the Queen's Bench Division reversed; rule for the issue of the writ of mandamus discharged; the

(1) 7 App. Cas. 1.

Attorney-General, on behalf of Her Majesty, to pay to the appellants the costs in the Courts below and the costs of the appeal to this House; cause remitted to the Queen's Bench Division.

Lords' Journals 13th December 1882 (1).

Solicitor for Appellants: *F. F. Smallpeice.*
Solicitor for Respondent: *Solicitor, Treasury.*

(1) 8th May, 1883. The following memorandum was made by Lord Blackburn (who presided in the House on the hearing and adjudication of the above appeal on the 6th, 7th and 13th days of December 1882) at a conference as to the directions contained in the judgment of this House of the 13th of December 1882 with respect to costs; which conference was attended by the Attorney-General on behalf of the Crown, and the Solicitor-General on behalf of the appellants Mews and Oastler; the Clerk of the Parliaments being present.

MEMORANDUM.

In this case the judgment of this House was that the judgment should be reversed, and it was further ordered that the respondent should pay the costs of the appeal and of the Courts below.

The respondent was in fact the Attorney-General acting for the Crown, and a difficulty has been made as to whether any order calling on the Crown, or the Attorney-General acting for the Crown, can be made to pay costs.

No such question was in fact raised or argued at the bar of the House nor decided by the Lords then present, the respondent having in the Court below received costs it was taken for granted he ought to pay them. These costs were accepted *per incuriam*, but that having been done, the Attorney-General has agreed not to take any objection under the special circumstances, but it is wished to prevent this case being in future cited as a precedent.

(Signed) BLACKBURN.
WILLIAM ROSE,
Cler. Parliamentor.

Applied. TUMAHOLE BERENG *v.* THE KING. [1949] A. C. 253

[HOUSE OF LORDS.]

H. L. (E.) 1883 *April* 9.

CHARLES BRADLAUGH . . . . . APPELLANT;

AND

HENRY LEWIS CLARKE . . . . . RESPONDENT.

Penalty—Common Informer—Prerogative of Crown—Parliamentary Oaths Act 1866 (29 *&* 30 *Vict. c.* 19) *s.* 5.

Where a penalty is created by statute and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it.

To enable a common informer to maintain an action for a penalty created by statute, an interest in the penalty must be given to him by express words or by sufficient implication.

The penalty of £500, "to be recovered by action in one of Her Majesty's Superior Courts at Westminster," which is imposed by the Parliamentary Oaths Act 1866 (29 & 30 Vict. c. 19) s. 5, upon any Member of the House of Commons voting as such in the House or sitting during any debate after the Speaker has been chosen without having made and subscribed the oath thereby appointed, cannot be recovered in an action by a common informer, and can be sued for only by the Crown:—

So *Held*, reversing the decision of the Court of Appeal (Lord Blackburn dissenting).

APPEAL by the defendant from two orders of the Court of Appeal (Bramwell, Baggallay and Lush L.JJ.) (1).

The pleadings are fully set out in the report of the case below.

The only questions raised by this appeal were whether the plaintiff, as a common informer, was entitled to sue for the penalty imposed by the Parliamentary Oaths Act 1866 (29 & 30 Vict. c. 19) s. 5—it being admitted by the pleadings that the defendant had voted as a member of the House of Commons and sat during a debate, after the Speaker had been chosen, without having made and subscribed the oath by that Act appointed—and whether the Courts below had power to order costs to be paid by the defendant to the plaintiff, and if so whether the power had been rightly exercised. The question mainly discussed in the Courts

(1) 7 Q. B. D. 38, 61, 62.

below, whether the defendant was entitled to affirm, was not now raised, the defendant having (as he alleged during the argument) undertaken not to raise it.

March 5. The Appellant in person:—

This action cannot be maintained by the plaintiff. All penalties imposed by statute belong to the Crown alone unless given in precise terms to an individual; e. g. to the party aggrieved or "to him or them who shall sue for the same:" Tomlin's Law Dict.; Jacob's Law Dict. "Penal Laws;" 16 Vin. Abr. p. 566, Prerog. T. 2, s. 21; Com. Dig. Forfeiture C.; *R.* v. *Malland* (1); *R.* v. *Hymen* (2). The Crown cannot be deprived of its right to a penalty by words of implication, but only by express words of enactment. Where the method of recovery is left in doubt the Crown and none other can sue. Penal statutes must be construed strictly as between an informer and a defendant and nothing extended against the defendant. The previous Act (1 Geo. 1 st. 2 c. 13 s. 17) imposed the penalty "to be recovered by him or them that shall sue for the same." This Act was repealed by the Act of 1866, and those words omitted purposely; but whether purposely or not the effect is the same. The Crown could bring every civil suit at its pleasure in any Court—any information for debt—though the Exchequer is the natural Court. The words "by action" may and here must include "information by the Crown;" and an information lies in all the superior Courts: 4 Com. Dig. Information A. 3 p. 559; A. 1 p. 557, and the authorities there cited. See also *R.* v. *Clark* (3); and Chitty's Prerog. Crown, ch. 12 p. 244, and the authorities there cited. 31 Eliz. c. 5 s. 5 which is limited to suits by the Crown, uses the word "action" advisedly. Therefore the Crown can sue, and if the words include the Crown they do not include a common informer. The king, by his prerogative, may sue in what Court he pleases: 6 Com. Dig. Prerog. D. 85; and cannot be deprived of his privileges but by express and clear words: 16 Vin. Abr. Prerog. T. 2 ss. 28 33, Z. 4, p. 572, citing 11 Rep. 74 b 75 a; *Magdalen College Case;* 6 Bac. Abr. Prerog. E. ss. 5, 7,

(1) 2 Str. 828. (2) 7 T. R. 536.
(3) 2 Cowp. 610.

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p. 472. See also 9 Geo. 3 c. 16 s. 1; 18 & 19 Vict. c. 90 s. 1 and 28 & 29 Vict. c. 104, as to "actions" by the Crown. But even if a common informer could sue a peer the judgment appealed against is wrong, because the words "a like penalty" mean only a penalty of a like amount, and do not apply to the mode of recovery. Lastly, the Courts below had no power to give the plaintiff costs. A common informer has no right to costs unless given by statute, and these costs are not given by the statute. The right to the penalty does not vest till the action is brought, and there are therefore no damages for detention, and consequently no costs: Jacob's Law Dict. "Costs," and Gray on Costs p. 6, and the authorities there cited. This was so before the Judicature Acts, and they have not altered the law in this respect. Even if the Court had a discretion it is a judicial discretion, and not absolute: *Foster* v. *Great Western Railway Company* (1).

[THE LORD CHANCELLOR referred to Order LV.; *Garnett* v. *Bradley* (2), and *Myers* v. *Defries* (3); and informed the respondent's counsel that the House did not require any argument from them on the question of costs.]

Sir *H. Giffard* Q.C. (*Kydd* with him) for the respondent:—

The judgment below was right. The words "to be recovered by him or them that shall sue for the same" were omitted from the Act of 1866, not accidentally but because the other words provided for the same effect. It would be strange if the Crown was meant to be the only plaintiff, since the words ordinarily used when the Crown is intended are omitted. The word "action" admittedly includes a suit by a common informer, whether it also includes information by Crown may be doubtful. But for the penalty the offence would be an indictable misdemeanour. It is absurd to suppose that the legislature meant to take away the consequences of a misdemeanour and yet give the penalty only to the Crown.

March 6. The appellant replied.

(1) 8 Q. B. D. 25, 30; reversed, p. 515, C. A.
(2) 3 App. Cas. 944.
(3) 5 Ex. D. 180, 184.

The House took time for consideration.

April 9. EARL OF SELBORNE L.C.:—

My Lords, the single question to be decided upon this appeal is whether a common informer can sue for the penalties imposed by the statute 29 & 30 Vict. c. 19 upon a member of the House of Commons sitting and voting in that House without having taken the oath prescribed by that Act. The words of the material clause (sect. 5) are these: "If any member of the House of Peers votes, by himself or his proxy, in the House of Peers, or sits as a Peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of £500 to be recovered by action in one of Her Majesty's superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence; and, in addition to such penalty, his seat shall be vacated in the same manner as if he were dead."

It was argued that the words "a like penalty" meant only a penalty of like amount, and not a penalty of like amount to be recovered in like manner. With that view I cannot agree; and in all that I say I shall assume that there is no difference as to the right of action for the recovery of the penalty between the case of a member of the House of Peers and that of a member of the House of Commons.

All previous enactments relating to the oaths to be taken by peers and members of the House of Commons (beginning with 30 Car. 2 stat. 2 c. 1, and ending with 23 & 24 Vict. c. 63) were repealed by this statute, which is, therefore (except as to the form of the oath, which was altered by the Promissory Oaths Act, 1868, ss. 2, 14), the only law now in force on that subject. The question was considered and determined in the Court of Appeal (where alone it was raised and argued) without reference to any of the repealed statutes, in the same way as if there had been no prior legislation upon the subject. It will be convenient, first, to examine, from the same point of view, the reasons assigned

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by the Court of Appeal for their judgment in the respondent's favour.

It was acknowledged, as an incontestable proposition of law, that "where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it." Lord Justice Bramwell referred to Comyns' Digest "Forfeiture" (C) as correctly laying down that doctrine. If it were necessary, many other authorities to the same effect might be mentioned. It rests on a very plain and clear principle. No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty of this nature unless it is expressly, or by some sufficient implication, given to him by statute. The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statutes for the public good, and is interested, jure publico, in all penalties imposed by such statutes; and therefore may sue for them in due course of law, where no provision is made to the contrary. The onus is upon a common informer to shew that the statute has conferred upon him a right of action to recover the particular penalty which he claims.

I do not agree with the argument of the appellant that, for such a purpose, express words are necessary. If an intention to confer such a right ought to be implied from what the Legislature has said, upon any sound principle of construction, that implication cannot, in my opinion, be excluded by reasons derived from the special prerogatives of the Crown.

Express words, giving a right of action to any one who may sue for the penalty, are certainly not found in this statute. Nor is there anything from which, upon ordinary principles of construction, such a right of action can be implied, unless the words "to be recovered by action in one of Her Majesty's superior Courts at Westminster" are, wholly or in part, inapplicable to the Crown.

It appears by the report of the opinions of the learned judges in the Court of Appeal that they were disposed to think (though they did not decide the point, and Lord Justice Bramwell expressed himself more doubtfully upon it than Lord Justice Lush)

that if the words had simply been "by action," the penalty would have belonged to the Crown alone; "because the word 'action' is a generic term, and may be used as a general term." But they thought it proved by the context, "in one of Her Majesty's superior Courts at Westminster," that the word "action" was here used "in the popular sense of a proceeding by writ;" because the option of suing in any one of those Courts was given; and they assented to the contention of the plaintiff's counsel that the sovereign could only sue by information in the Court of Exchequer, and could not sue in the Court of Queen's Bench or in the Court of Common Pleas, for such a penalty. Lord Justice Bramwell referred to a note by Mr. Hammond, the editor of the 5th edition of Comyns' Digest (published in 1822), to the passage "Forfeiture" (C), which speaks of the right of the Crown to recover unappropriated penalties. That note rests upon the case of *Rex* v. *Malland* (1), and is in these words: "Where the statute does not express how it shall be recovered it must be sued for in the Exchequer." The learned Judge quoted the terms of the report of *Rex* v. *Malland* (1), and of the reporter's marginal note to that case (in which, however, it is not said that the Crown could not sue for an unappropriated penalty elsewhere than in the Exchequer, but only that such a penalty "was suable for in a Court of Revenue, and not by indictment"), and he added, "On the principle established by these authorities it is argued that, as this penalty may be recovered by action in any one of Her Majesty's superior Courts at Westminster, it is not the Crown who is to sue for the penalty but the common informer, including the plaintiff. By that reasoning I own that I am convinced; and therefore I think this action maintainable by the plaintiff." In the sequel of his judgment the same very learned Judge made it plain that his conclusion was—not that either the Crown or a common informer might sue, but that the Crown could not sue for this penalty; and therefore, that, unless the common informer could sue, the Legislature would have "created a penalty not recoverable by anybody." Lord Justice Lush expressed himself very much to the same effect, and Lord Justice Baggallay concurred.

The argument at your Lordships' bar has satisfied me that the

(1) 2 Str. 828.

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ground on which the judgment appealed from was thus rested cannot be maintained, and that (unless the word "action" is inappropriate with respect to a suit by the Crown) there would have been in 1866 no legal impediment to a suit for this penalty by the Crown in the Court of Queen's Bench or the Court of Common Pleas; and that Mr. Hammond's note to Comyns' Digest, "Forfeiture" (C), if its meaning really is that the Crown could not sue for a penalty elsewhere than in the Court of Exchequer, is incorrect. It has been repeatedly laid down by high authority, as a rule of the common law, that the King by his prerogative may sue in what Court he pleases: *Magdalen College Case* (1); *Brownloe* v. *Mitchell* (2); Fitzherbert's Natura Brevium, 7 B and 32 E; *Burgess* v. *Wheate* (3); and see Bacon's Abridgment "Prerogative," ed. 1832, vol. vi. p. 472, and Chitty on Prerogative p. 244). Fitzherbert (32 E) when speaking of quare impedit says, "The King may sue this writ and every writ in what Court he will." In *Burgess* v. *Wheate* (3), Sir Thomas Clarke, Master of the Rolls, meeting the objection that the Court of Chancery was not a proper Court for the Crown "to sue in" (for an escheat), "but it should have been a Court of Revenue," said, "Though the Crown may insist on being sued in its own proper Court, yet it may sue in what Court it pleases," citing Finch 84 (1 William Blackstone 131 132). In *Rex* v. *Clark* (4) and *Rex* v. *Hymen* (5) the Crown did sue for and recover in the Court of King's Bench penalties incurred under two Revenue Acts, 8 Geo. 1 c. 18, ss. 23 and 25, and 24 Geo. 3 stat. 2 c. 47, s. 38, both which expressly enabled a common informer to sue, and only mentioned the Crown as entitled to a moiety of the penalties and forfeitures incurred. As to the manner of suit, the earlier of those Acts provided that such penalties and forfeitures "should and might be prosecuted and determined by bill, plaint, or information in any of His Majesty's Courts of Record at Westminster, or in the Court of Exchequer at Edinburgh respectively;" the later, that "all the same penalties and forfeitures should and might be prosecuted and sued for, and the causes and controversies arising thereupon tried, heard,

(1) 11 Co. Rep. 75 a.
(2) 1 Roll. Rep. 290.
(3) 1 W. Bl. 131, 132.
(4) 2 Cowp. 610.
(5) 7 T. R. 536.

and determined in any of His Majesty's Courts of Record at Westminster, or in the Court of Exchequer at Edinburgh respectively." In the latter of those cases (*Rex* v. *Hymen* (1)) after conviction "a doubt arose whether the King could sue for the whole penalty, and, if he could, whether it should not be by a prosecution in the Exchequer." The counsel for the prosecution on a later day referred to *Rex* v. *Clark* (2), and stated "that there were many precedents in the Crown Office of similar proceedings." The Court was satisfied with those authorities, and ordered the defendant (for whom Mr. Erskine was counsel) to pay the whole penalty.

These authorities appear to me to prove that a suit to recover such a penalty as that incurred by the appellant might, in and after 1866, have been brought by the Crown in any one of the Superior Courts at Westminster, and consequently that the option given to sue in any one of those Courts cannot be a sufficient reason for letting in a common informer under a statute by which a right of action is not otherwise given to him. I am also satisfied after full consideration that the word "action" is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and, therefore, not furnishing any sufficient ground for implying a right of action in a common informer. That it is used as "nomen generalissimum" in this particular statute seems probable, from the fact that it stands there alone, without having superadded to it a number of other technical terms, which are usually found associated with it in earlier statutes. Lord Coke (Coke, Littleton, 284 b 285 a, and Reports, pt. 8, 151 a) adopts Bracton's definition of an "action:" "Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur;" also giving (in the former of those places), its equivalent in Norman-French: "Action n'est auter chose que loyall demande de son droit." In the third Institute (p. 136) he says: "The King may have an action for such wrong as is done to himself, and whereof none other can have any action but the King, without being apprised by indictment, presentment, or other matter of record, as a quare impedit, quare incumbravit, a writ of attaint, of debt, detinue of ward, escheat, scire facias pur repealer patent," &c. So also Fitzherbert (Fitzherbert, Natura

(1) 7 T. R. 536. (2) 2 Cowp. 610.

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Brevium, page 200, I.): "The King shall have an action of trespass." In Comyns' Digest, "Action" (B) the term is applied to various rights of suit by the Crown, writ of right, writ of escheat, and other civil remedies, including debt and trespass; and in "Action" (D) it is extended even to placita coronæ, or criminal proceedings; as it is also in Bacon's Abridgment ("Actions in general," A.). In the same Abridgment ("Prerogative," E. 7), it is said: "The King, though the head and chief of his kingdom, may redress any injuries he may receive from his subjects by such usual common law actions as are consistent with the royal prerogative and dignity;" and in Chitty, "Prerogative," p. 245: "The general rule is, that the King may waive his prerogative remedies, and adopt such as are assigned to his subjects; he may maintain the usual common law actions, as trespass quare clausum fregit, or for taking his goods."

These statements of the law are in accordance with the language of the statute 31 Eliz. c. 5, "Concerning Informers" (sect. 5), which speaks of "Actions, suits, bills, indictments, and informations," with express reference to "any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited *to the Queen, her heirs or successors only.*" Considering the nature of the subject with which that statute deals, I am not surprised at the reference which the appellant made to it in his argument at your Lordships' bar.

The conclusion to which I have been brought is, that there is no difficulty in applying any part of the language of the clause in the Act of 1866, which creates the penalty sued for in the present action, to a suit by the Crown; and, therefore, that no part of that language affords any sufficient ground for implying an intention on the part of the Legislature to give a common informer, as well as the Crown, a right of action for that penalty.

One of my noble and learned friends is, however, as I understand, of opinion, that although the words of the Act of 1866 might not by themselves afford any sufficient ground for such an implication, it may, nevertheless, be derived (according to those principles applicable to the construction of statutes, which are stated in *Heydon's Case* (1) and in *Hawkins* v. *Gathercole* (2)) from

(1) 3 Co. Rep. 7 b. (2) 6 D. M. & G. 1.

a comparison of the policy and provisions of that Act with those of the former enactments in pari materiâ which were thereby repealed.

In the application of those principles of construction it is essentially needful to remember that the office of a Court of Justice is to interpret the law and not to make it. In ancient times the provinces of the Judge and of the legislator were not unfrequently confounded under colour of those principles. They afford useful aids for the resolution of doubts, when (as in *Hawkins* v. *Gathercole* (2)) the question is how far, if at all, an earlier statute has been indirectly repealed or overridden by a later, which does not expressly mention or refer to it; or when difficulties arise out of the apparently conflicting language of several laws concurrently in operation; or when the words of a statute are susceptible of divers constructions, one of which may be recommended and another repelled by considerations derived from the known policy of the law, or from general reason and justice. In the present case there is no question as to the total and absolute repeal of the former enactments; and if the word "action" has really that sense which I suppose it to have, there appears to be no uncertainty, or room for doubt, as to the proper meaning of the words which the Legislature has used. They mean that the penalty is to be recovered by proceeding in due course of law in any one of the Superior Courts at Westminster; that, and nothing else. Their silence as to the person who is to recover the penalty creates no more difficulty or uncertainty than if the statute had simply imposed the penalty and had said nothing at all about the manner of recovering it. It must be recovered by him to whom it is due; and it is due to the Crown, and not to the informer, unless there is enough in the statute to shew affirmatively, by words pointing to the informer, or negatively by words exclusive of the Crown, that the informer was meant to have it. I think it would be legislation, and not interpretation, to import into this Act, by any inference from the repealed enactments, provisions in favour of a common informer which the Act does not itself contain.

The intention of the repealed statutes, in this respect, did not depend upon any uncertain implication. Of the two earliest,

(1) 6 D. M. & G. 1. 1 Jur. N.S. 481

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one (30 Car. 2 st. 2), which imposed the oath against transubstantiation, applied to members of the two Houses of Parliament only; the other (13 Wm. 3 c. 6) which imposed the first oath of abjuration was applicable also (as was the third, 1 Geo. 1 st. 2 cap. 13, imposing a like oath, and also an oath against the deposing power of the Pope) to all holders of public offices of every kind, and members of the universities and learned professions, &c., &c., throughout the kingdom. All those Acts placed the person who omitted to take the oaths prescribed by them under heavy civil disabilities; and the two earlier provided especially, that every peer or member of the House of Commons offending against them should be "deemed and adjudged a popish recusant convict," and should be disabled from sitting or voting in either House of Parliament, and in other respects practically outlawed. By the Act of Charles II. the seat of an offending member of the House of Commons was also declared void. The pecuniary penalty of £500 imposed by the two earlier of those Acts on members of either House was "for every wilful offence" against the Act; and was "to be recovered and received by him or them that should sue for the same, and to be prosecuted by any action of debt, suit, bill, plaint or information, in any of his Majesty's Courts at Westminster." The severity of those Acts was mitigated by 1 Geo. 1 st. 2 c. 13 s. 17, to this extent only, that offenders against that statute were no longer made "Popish recusants convict," and (singularly enough) the incapacity to sit or vote in Parliament was omitted. The pecuniary penalty of £500 was no longer imposed "for every wilful offence against the Act," but (apparently, though the point may admit of doubt) only once. The other disabilities and incapacities were, substantially, the same as under the Act of William III., and the £500 penalty was recoverable "by him or them that should sue for the same, to be prosecuted by action of debt, suit, bill, plaint, or information, in any of his Majesty's Courts at Westminster, . . . and by way of summary complaint before the Court of Sessions, or prosecution before the Court of Justiciary in Scotland."

By all these three Acts, members of either House of Parliament were prohibited, not only from voting, but also from sitting

in Parliament during any debate (in the House of Lords generally, in the House of Commons after the choice of a Speaker), and by the Act of Charles II. the disabilities and the penalty were made co-extensive with the prohibition. But in the Acts of William III. and George I. (for whatever reason) the only offence for which the disabilities and the pecuniary penalty were imposed was that of *voting* without having taken the prescribed oath. It may be that, under these two Acts, a member of Parliament who had not taken the oath, if he sat in either House during debate (though he did not vote) might have been prosecuted for a misdemeanour; but he certainly did not thereby incur the £500 penalty, and he could not have been sued for that offence by a common informer.

All the later enactments mentioned in the schedule to the Act of 1866 had for their object to change either the matter, or the form, of the prescribed oaths, sometimes generally, sometimes as to particular classes of persons; and they are all thereby repealed, so far (and so far only) as they relate to oaths required to be taken by members of the two Houses of Parliament. Most of them extended also to other holders of offices, &c., for the time being required by law to take the prescribed oaths, as to whom the Act of 1866 did not repeal them. In those later Acts there was nothing new as to penalties; the provisions on that subject of 1 Geo. 1 st. 2 c. 13 were applied by them to any neglect to take the altered oaths, in terms of reference which it is sufficient to quote from 21 & 22 Vict. c. 48. That Act substituted for the oaths of allegiance, supremacy, and abjuration, in all cases in which they were previously by law required, a new oath to the following effect, viz. (1), that the person taking it would bear true allegiance to the Queen; (2), that he would do his utmost to disclose all conspiracies, &c.; (3), that he would maintain to the utmost of his power the succession to the Crown, as settled by law; (4), that he disowned all obedience or allegiance to all pretenders; and (5), that he rejected all claims to jurisdiction, &c., by foreign princes or others within this realm. The neglect to take that oath was to be "attended with the like disabilities, incapacities, penalties, liabilities, and consequences as then" (i.e., in 1858) "by law provided in the case of refusal, neglect, or omission

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to take, or take and subscribe respectively the oaths of allegiance, supremacy, and abjuration, and all provisions then in force were to be construed and take effect accordingly." This is the latest of the repealed enactments in which penalties are mentioned.

If it were proper on this occasion for your Lordships to enter into considerations of policy not apparent upon the face of the Act of 1866, which might possibly be collected or inferred from the prior enactments thereby repealed, I should, for my own part, be unable to found upon the provisions of those prior enactments any safe or satisfactory conclusion that the reasons which may have led the Legislature in 1677, 1701, and 1714, to make the pecuniary penalties then imposed recoverable by popular actions (i.e. by a common informer) were also applicable to the legislation of 1866. It is obvious that the provisions (in this and some other respects) of the Acts of Charles II., William III., and George I., may have been, and probably were, influenced by considerations, some of which have now lost their force; in the first of those reigns, by the want of confidence then felt in the Crown upon the particular subject to which the oath then imposed related; and in the two latter, by the serious danger to the peace of the realm from the claims and designs of pretenders. What was done under such influences might remain, after those particular considerations had ceased to operate, till the whole law on the subject was deliberately reviewed by the Legislature; but on such a review it might, not improbably, be changed. It is also, to say the least, reasonably probable, that motives might exist for giving a right of action to a common informer, when the object was to secure the taking of the prescribed oaths, not only by members of the two Houses of Parliament, but by many official and other persons, dispersed throughout the whole community, which might not have the same force when the oaths to be taken by the members of the two Houses of Parliament were (as they were in the Act of 1866) alone in view. I also believe it to be true, as was stated at the bar, that it was much more generally the policy of the Legislature in former than in recent times to give penalties imposed by public statutes to common informers.

When the particular provisions of the Act of 1866 are examined, the danger of importing into them for this purpose a policy

supposed to be gathered from the provisions in pari materiâ of the repealed Acts, becomes, to my mind, still more apparent. In the first place the test imposed on members of the two Houses of Parliament was then, for the first time, reduced to the simple oath of allegiance and a promise to maintain the succession to the Crown as settled by law. In the next place, the penal clause (sect. 5) of the Act of 1866, itself affords conclusive proof of, at least, *some* intentional change of policy. It differs from the corresponding clauses of the former Acts, not only by omitting the words which in those Acts gave a common informer the right to sue, but also in other most material respects, which cannot be accounted for upon any theory of inadvertence or oversight. The civil disabilities and incapacities of 13 Will. 3 c. 6 and 1 Geo. 1 stat. 2 c. 13 are not re-enacted; the forfeiture of £500 is now the sole penalty, with a provision (which was found in the Act of 1677, but not in that of 1701 or 1714) for vacating the seat of an offending member of the House of Commons. The £500 penalty is under this Act still made recoverable in any one of the superior Courts at Westminster; but not (as under the Act of George I.) in any Scottish Court. And this penalty is imposed by the Act of 1866 toties quoties for every act of sitting or voting in Parliament without having taken the oaths, which was not done at all as to *sitting*, and was, at least, not clearly done toties quoties as to *voting*, by that Act.

The words of 1 Geo. 1 st. 2 c. 13 s. 17 are, "If any member of the House of Peers or member of the House of Commons, in this or any succeeding Parliament *presume to vote or make his proxy*, not having taken the said oath and subscribed the same, every such Peer or member *so offending* . . . . shall forfeit the sum of £500," &c. The words of the Act of 1866 are, "If any member of the House of Peers *votes, by himself or his proxy*, in the House of Peers, or *sits as a Peer during any debate* in the said House, without having made and subscribed the oath hereby appointed, he shall, *for every such offence*, be subject to a penalty of £500, &c., and if any member of the House of Commons *votes as such* in the said House, *or sits during any debate after the Speaker has been chosen*, without, &c., he shall be subject to a like penalty for *every such offence*." The difference

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between a single penalty (assuming that to have been the proper construction of the Act of George I.) for neglecting to take the oath before voting, and a penalty toties quoties for every act of voting *or sitting* without having taken the oath, is enormous; and it may be illustrated by the facts which were before the Courts in the present case. The present appellant claimed to be by law entitled to sit and vote after making an affirmation; and on the 2nd of July 1880, he was permitted by the House of Commons to do so, "subject to any liability by statute" (1). The judgment of the Queen's Bench Division, holding that he was bound to swear and was not entitled to affirm, was not pronounced till the 11th of March 1881. It is, therefore, conceivable (whether the fact be so or not) that the appellant might have sat (voting or not voting) in the House of Commons on every day when that House met during the whole interval between the 2nd of July 1880 and the 11th of March 1881, which would be about ninety days, making the cumulative penalties incurred by him not less than £45,000. The Legislature might well have hesitated to place it in the power of every common informer to enforce fines of such enormous amounts as might be incurred under the Act of 1866, either through some such controversy as that which occurred in the present case, or when (as happened to certain Peers who obtained Acts of Indemnity) the necessity for a repetition of the oath by a Peer in every new Parliament was not understood.

The Legislature, when making these material and important changes in the provisions and terms of the penal section of the Act of 1866, must, I think, be taken to have had under its eyes the provisions and terms of the penal clauses of the former statutes, and to have deliberately departed from them; and that with knowledge of the law that every unappropriated penalty goes to the King, and that a common informer cannot have any right to, or interest in, a penalty imposed by a public statute, unless it is given to him either expressly, or by a just and reasonable implication from the words which the Legislature has used. The whole provisions of the earlier Acts, as to the manner of recovering penalties, might easily have been kept alive by

(1) 7 Q. B. D. 42.

proper words of reference, and applied to the new form of oath, as had been done by 6 Geo. 3 c. 53, 10 Geo. 4 c. 7 s. 4, and 21 & 22 Vict. c. 48, if that were the intention; and this, although the civil disabilities and incapacities might have been removed. But it was not done; new words omitting the grant of the penalty "to him or them that should sue for the same," were (designedly, as I must take it) used; and all the former Acts, so far as they related to the oaths to be taken by members of either House of Parliament, were absolutely, and without reservation, repealed.

I am, for these reasons, of opinion that your Lordships ought to construe the words of the penal clause of the Act of 1866 as they stand, without importing into them any considerations of policy from the provisions of the former Acts as to popular actions, which are not in terms re-enacted. It follows that, in my judgment, the present appeal ought to succeed, and I shall humbly move your Lordships that the judgment appealed from be reversed and the action of the respondent against the appellant be dismissed with costs, and that the respondent do pay the costs of this appeal.

LORD BLACKBURN:—

My Lords, on the argument of this appeal all the other questions were disposed of in favour of the respondent, but your Lordships took time to consider the question whether, on the construction of the statutes, the penalty of £500, which was clearly imposed on the appellant, could be recovered by any one who sued for it, which was the view which the Court of Appeal took; or whether, as the appellant contended, it could be sued for by the Sovereign only, and not by any one else.

The Act for securing the succession of the Crown—1 Geo. 1 stat. 2 c. 13—required oaths of allegiance, supremacy, and abjuration to be taken by different persons. Amongst others, by the 16th section, it required them to be taken by the members of both Houses of Parliament. By sect. 17 it is enacted that if any member of either House vote before taking the oaths, he shall incur heavy disabilities, "and shall forfeit the sum of £500 to be recovered by him or them that shall sue for the same, to be prosecuted by action of debt, suit, bill, plaint, or information in any

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of His Majesty's Courts at Westminster, and by way of summary complaint before the Court or (*sic*) Sessions" (probably a misprint for Court of Session) "or prosecution before the Court of Justiciary in Scotland." Whilst this remained in force it is quite plain that the intention of the Legislature was that the penalty was to be recovered in England by what is called an action popular, thus defined in the "Termes de la Ley:"—"Action popular is an action given upon the breach of some penal statute, which action every man that will may sue for himself and the King, by information or otherwise, as the statute allows and the case requires. And of these actions there are an infinite number. . . . And because this action is not given to one especially, but generally to any of the King's people that will sue, it is called an action popular. But in this case when one hath begun to pursue an action, no other may sue it; and in this, as it seems, it varies from an action popular by the civil law."

It is not, I think, material to inquire how it was to be enforced in Scotland, though it is material to notice that a remedy was given in the Scotch Courts.

The nature of the oaths to be taken was varied by several Acts, but all contained a clause to the like effect with the 3rd section of 21 & 22 Vict. c. 48, which is that "the taking and subscribing of the oath hereby appointed shall have the like effect as the taking and taking and subscribing respectively of the oaths of allegiance, supremacy, and abjuration would have had if this Act had not been passed; and the refusal, neglect, or omission to take and subscribe the oath hereby appointed shall be attended with the like disabilities, incapacities, penalties, liabilities, and consequences as now by law provided in the case of refusal, neglect, or omission to take or take and subscribe respectively the oaths of allegiance, supremacy, and abjuration; and all provisions now in force shall be construed and take effect accordingly." So as the law stood up to 1866, the omission to take the altered oath still rendered the party offending liable to great disabilities, and also to a penalty of £500 to be recovered in England by action popular, and in Scotland by some process.

Such being the state of the law, the Parliamentary Oaths Act 1866 was passed. The preamble is—"Whereas it is expedient that one uniform oath should be taken by members of both

Houses of Parliament on taking their seats in every Parliament," and the first four sections are strictly within the object specified by this preamble. But the 5th and 6th sections go further. The Acts and parts of the Acts specified in the schedule are repealed; and amongst those so specified are the 16th and 17th sections of 1 Geo. 1 stat. 2 c. 13, and the various enactments which, whilst varying the form of oath, preserved the effect of sect. 17, and applied it to the omission to take the substituted oath.

In lieu of these repealed enactments it is by sect. 5 enacted, "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of £500 to be recovered by action in one of Her Majesty's superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead."

It is impossible to doubt that the Legislature have sufficiently expressed an intention that the offender shall no longer be liable to any of the disabilities imposed by sect. 17, and that the penalty shall no longer be recoverable in the Scotch Courts, and in both respects, though the enactment goes beyond the object stated in the preamble, a Court of law must give effect to the intention thus expressed. But it seems to me equally beyond doubt that the Legislature have expressed an intention to impose a penalty of £500 on the member offending by omitting to take the oath now in force; and the question in my mind is whether or not the Legislature has expressed an intention that this penalty shall not be recoverable, as the penalty under the repealed legislation was, by an action popular, but only by a suit brought by information by the Attorney-General suing on behalf of the Sovereign. And on this question, and on this alone, I have not been able to agree with the rest of your Lordships.

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All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject matter and for the object with which that statute was made; it being a question to be determined by the Court, and a very important one, what was the object for which it appears that the statute was made.

In *Garnett* v. *Bradley* (1) Lord Hatherley takes the law "as laid down by Lord Justice Turner in a well-known case, which gave rise to considerable discussion, that of *Hawkins* v. *Gathercole* (2)." Lord Justice Turner in that case says that the rule is well expressed in *Stradling* v. *Morgan* (3). That was a case in 2nd Elizabeth. The report says (4) that "it was argued by the counsel for the defendant, and also it was argued and held by all the Barons," that the defendant was not within the purview of the statute, though they all agreed that he was within the words of the statute. Many cases are referred to, and then, at p. 205a, comes the passage which Lord Justice Turner cites as well expressing the rule upon the subject: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded *upon the intent of the Legislature*, which they have collected, sometimes by considering *the cause and necessity of making* the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." The

(1) 3 App. Cas. 950.
(2) 6 D. M. & G. 1.
(3) Plowd. 199.
(4) Plowd. 203.

same thing is stated by Lord Coke in *Heydon's Case* (1) in 26 Elizabeth to have been resolved in different words, but to the same effect.

My Lords, in most cases in which general rules have to be applied, the difficulty is as to their application. I think, in modern times, much more weight has been given to the natural meaning of the words than was done in the time of Elizabeth; and in some cases in which the old Judges have given effect to the general intention as overruling the particular words, a modern Court would have given effect to the particular words as shewing that the intention really went further than what was supposed. The Civil Code of Canada, article 12, well expresses what I think is the principle, and also the qualification which I think must now be put on the older authorities. "When a law is *doubtful* or *ambiguous* it is to be interpreted so as to fulfil the intention of the Legislature, and to attain the object for which it was passed. The preamble, which forms part of the Act, assists in explaining it." It is upon this principle that it is held, as I think it has always been held, that where a statute was passed for the purpose of repealing and, in part, re-enacting former statutes, all the statutes in pari materiâ are to be considered, in order to see what it was that the Legislature intended to enact in lieu of the repealed enactments. It may appear from the language used that the Legislature intended to enact something quite different from the previous law, and where that is the case effect must be given to the intention. But when the words used are such as may either mean that former enactments shall be re-enacted, or that they shall be altered, it is a question for the Court which was the intention. And in this case, as there never had been any objection to the mode in which the penalty was to be recovered, viz., by action popular; as that was not, in the language of *Heydon's Case* (1), the mischief for which it was intended to provide a remedy; and as there obviously might be serious objections made to an alteration of the law which left to the Crown alone a chief means of enforcing the taking of the oath, and in the case of a Peer the only means, I think it not too much to say that the burthen rests on those who say that the words used shew that it

(1) 3 Co. Rep. 7 b.

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was the intention of the Legislature so to enact. I do not say that this is conclusive against the appellant's construction of the statute. I only say that the case is more favourable to the respondent than it would have been if the statute had been one for the first time imposing a penalty in the words here used, instead of being, as it is, one containing a repeal and partial re-enactment of a previous statute.

The appellant argued that the prerogative of the Crown is not taken away except by express words, and that it was part of the prerogative of the Crown to have forfeitures. This is, I think, a mistake; the forfeiture goes in the manner in which the statute enacting it directs it to go. It goes to the Crown, unless it sufficiently appears that the intention was to make it go elsewhere; but that intention may be shewn by implication. But the appellant did succeed in shewing to my satisfaction that part of the reasoning of the Lords Justices, and that a part on which their judgment was based, was not correct.

In the popular use of words an information by the Attorney-General to recover a debt due to the Crown is spoken of as an information and not as an action, which in popular language would be taken to mean an action by a subject. But in legal phraseology "action" includes every suit, whether by a subject, or in the name of the Sovereign, or by an information by the Attorney-General on behalf of the Crown. For this the definition of "action" given in Coke, Littleton 285, is a sufficient authority, but it is still more distinctly laid down in the 3rd Institute, 136, where it is said by Lord Coke, "The King may have an action for such wrong as is done to himself, and whereof none other can have any action, but the King (without being apprised by indictment, presentment, or other matter of record), as a quare impedit, quare incumbravit, a writ of attaint, of debt," &c.

Bramwell L.J. says, that from the consideration that "action" was nomen generale, he should have had some doubt, if the words had been merely "to be recovered by action," whether the Court would have been justified in coming to the conclusion that a common informer might sue. He proceeds:—"But in addition there are these other words, 'in one of Her Majesty's Superior Courts at Westminster.' Now unless we

suppose that it was intended to confer on the Crown a new, exceptional, and anomalous power, that is to say, of suing for a penalty due to Her Majesty in some Court other than a Court of revenue, it is manifest that the enactment cannot apply to the Crown." And Lush, L.J., says, "Now it (the statute) does not in terms say who shall have that penalty, or who shall sue for it; and if the words had simply been 'by action,' I am inclined to think at present it would have belonged to the Crown alone, because the word 'action' is a generic term, and may be used as a general term. But it is evident that that is not the sense in which the word 'action' is here used. It is used here in the popular sense of a proceeding commenced by writ, because it is to be 'in one of Her Majesty's Superior Courts at Westminster,' which means of course in either of them. Now the Sovereign could only sue by information in the Court of Exchequer. The Sovereign could not have sued in the Court of Queen's Bench or the Court of Common Pleas for this penalty."

I think that the appellant was right when he argued that though the Court of Exchequer is a Court having jurisdiction over all causes which concern the King's profit, and is one therefore to which such a suit more properly belongs, yet that the right of the Sovereign, or the Attorney-General suing for the sovereign, to sue for a debt is not confined to suing in the Exchequer. The King has many privileges in suits. It is laid down in Fitzherbert, Natura Brevium, 7 B. 32 E. and in the case of *Magdalen College*, 11 Reports, 75 a, that the King by his prerogative may sue in what Court he pleases; and in the two cases in the Year Book, cited in 3rd Institute, 136, 19 H. 6, 47 and 34 H. 6, 3, debt was brought by the King's grantee in the name of the King in the Common Bench. And in *Rex* v. *Gregory* (1), where the objection was that the King could not declare in his own name in debt in the King's Bench, but the Attorney-General should have sued in his name, though Lord Hale, then Chief Justice, said it was an unmannerly way of pleading for the King, and took time to consider, judgment was given for the King. It does not seem to have occurred to any one that the action would not lie in the King's Bench,

(1) 2 Lev. 82.

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and since the Revolution, in the case of an information for a penalty created by a statute which imposed the penalty, one-half to go to the King and one-half to whoever would sue for it, the whole penalty was recovered by information in the Court of King's Bench, *Rex* v. *Clark* (1), without any objection.

The last case in which the point was raised was in *Rex* v. *Hymen* (2). There an information was brought by the Attorney-General in the King's Bench for a penalty incurred under 24 Geo. 3, stat. 2, c. 47, by the 38th section of which one moiety of the several penalties in this Act mentioned shall be to the use of the King, and the other moiety shall be to the use of the person who shall prosecute for the same, and all such penalties "shall and may be prosecuted and sued for, and the causes and controversies arising thereupon tried, heard and determined in any of His Majesty's Courts of Record at Westminster or in the Court of Exchequer at Edinburgh respectively." The defendant having been convicted, a doubt arose whether the King could sue for the whole penalty, and, if he could, whether it should not be by a prosecution in the Exchequer. The Court, after argument, and taking time for inquiry, it being stated that there were many precedents in the Crown Office, besides *Rex* v. *Clark* (1), directed that the Crown should recover the whole penalty. This is a direct authority that even under the repealed section 17 the King might have recovered the penalty by information in the King's Bench, unless some private person had first sued, though there could be no doubt that under that enactment any one might bring an action popular, unless the King had been before him. That is not the point now before this House. But it is also a direct authority for the position that the power to sue in some Court other than a Court of revenue was neither new nor exceptional. Indeed, words conferring this power on the Crown were superfluous and unnecessary, for the Crown could so sue without them. The appellant was, I think, justified in contending that if these authorities had been produced on the argument before the Lords Justices, they would not have decided as they did without solving the question on which Lord Justice Bramwell says that he should have had some doubt,

(1) 2 Cowp. 610. (2) 7 T. R. 536.

and Lord Justice Lush says that he was inclined at present to agree with the now appellant, viz., whether there was enough in the words used in a popular sense to shew that an action popular would lie. He argued further, that if they had not been under this misapprehension they would have decided in his favour, and so claimed their judgments as authorities in his favour. I am not prepared to go so far with him.

I think, if this had been an enactment in the first instance imposing a penalty, I should have been much in the condition in which Lord Justice Bramwell says he was. Though certainly even in a book so little popular as Coke's Entries, suits on behalf of the Crown are collected not under the head of "action," but of "information," so that there is little doubt that the word "action" in popular language would mean an action by a subject; and though the argument that the use of this popular language shewed that the intention was to enable a subject to sue is strengthened by the following provision which would be useless unless a popular action was given (for the King could without it sue in any Court), I should have some doubt whether that would be enough to justify the conclusion that it was intended that the penalty might be recovered by a popular action. The words may mean that, but they may not. But this is a statute repealing, and in part re-enacting, a former statute; and I think it would be dangerous if an alteration of the law which no one contemplated or intended could be brought about by the accidental use of uncertain words. I am chiefly influenced by this consideration in holding that we should not conclude that the Legislature intended an important alteration in the law, unless the words used shew, more clearly than those in this Act do, that such was the intention. In every case in which a previous enactment is repealed and re-enacted in different words, it is argued, on the one side, why are the words changed at all, unless it was intended to change the meaning? and on the other side, why, if the intention was to change the meaning, are words repeated which at least afford an argument for saying that the meaning was to remain the same? In the present case why were the words, "by him or them who shall sue for the same" left out, if a popular action was intended to be continued? Why were the words "to

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be recovered by action in one of Her Majesty's superior Courts at Westminster" left in, if it was intended to confine the recovery to one by information at the suit of the Crown, in which case they are superfluous? It seems to me that those two arguments neutralize each other.

On the whole, though not without feeling that the case is one of difficulty, and on which opinions may well differ, if the case depended on my opinion the judgment would be affirmed, though not for the reasons given below. As the majority of your Lordships think otherwise it must be reversed, and I agree that there is no reason why the ordinary rule as to costs should not be followed.

LORD WATSON:—

My Lords, it is an unfortunate feature of this appeal that whilst the decision of the Court below, upon the merits of the cause, is not impeached, the only point argued at your Lordships' bar was a preliminary objection to the plaintiff's (respondent's) title to sue, which was not stated at all in the Court of first instance, and, though stated, was not satisfactorily argued before the Court of Appeal.

In the case of statutory penalties, enacted solely for the purpose of enforcing or protecting the interests of the public, the Crown alone has, by virtue of its prerogative, a title to sue and recover, unless the Legislature shall otherwise direct. That seems to me to be, beyond doubt, the law of England. The law of Scotland is the same; and the language used by the late Lord Neaves, with reference to the pursuer in the case of *Mackintosh* v. *Weir* (1), aptly describes what I take to be the position of the respondent in this appeal. In that case the learned Judge said: "With regard to the penalty here claimed, it is impossible to contend that the party injured is entitled to recover a statutory penalty unless that is declared in the statute. It is not intended for his pecuniary benefit at all. It is imposed for the public interest and is due to the Queen, if Parliament has made no other provision for its disposal."

The real controversy between these parties is, accordingly,

(1) 2 Court Sess. Cas. 4th Ser. p. 882.

reduced to this issue: Has the Legislature by the provisions of the Parliamentary Oaths Act 1866, empowered a common informer to sue for the penalties created by the 5th section of that statute? I do not think that, in order to confer the right to sue upon a common informer, express statutory words are required. It will be sufficient, in my opinion, if the intention of the Legislature to give him the right can be derived by reasonable implication from the language of the statute enacting the penalty. The creation of a penalty to be sued for by an informer is not in any proper sense an invasion, or even a limitation, of the royal prerogative; and the intention to enact such a penalty may be indirectly expressed in words which would be ineffectual to deprive the Crown of prerogative rights which had already vested.

Taking the words of sect. 5 of the Act of 1866 per se, I am unable to find any expression sufficient in my opinion to sustain the inference that the Legislature intended that a suit for the penalties thereby provided should lie, at the instance of a private person. The only possible foundation for such an inference is to be found in the words "to be recovered by action in one of Her Majesty's Superior Courts at Westminster." If it could have been shewn that the Crown could not sue for such penalties in the Court of Queen's Bench, or in the Court of Common Pleas, as was held by the Lords Justices, I think the necessary result would have been that the respondent had a good title to institute the present action. But the authorities which the Lord Chancellor has cited, to which I need not again refer, conclusively establish that these words appropriately describe suits which might be competently brought by the Crown for recovery of such penalties in any one of Her Majesty's Superior Courts at Westminster. No doubt the words are also capable of being read as applicable to suits at the instance of Her Majesty's subjects; but I do not think that circumstance is, in itself, sufficient to indicate that they were intended, and therefore ought to be so read.

I am disposed to hold (although after hearing the opinion of the noble and learned Lord who has just spoken, not without hesitation,) that the enactments of sect. 5 are not characterized

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by any ambiguity which requires or justifies a resort to statutes, now repealed, for aid in their interpretation. The whole previous enactments upon the subject of parliamentary oaths have been swept away by express words of repeal, and a new code of law has been substituted for them by the Act of 1866. It appears to me to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed, in order to ascertain what the Legislature meant to enact in their room and stead. There may possibly be occasions on which such a reference would be legitimate. In the present case the words of the existing Act are, in my opinion, capable of being interpreted without such foreign aid; and I therefore do not think it competent to examine the enactments of statutes no longer existing, for the purpose of imposing upon those words a meaning which, taken by themselves, they do not bear.

These are, shortly stated, the considerations which have led me to form an opinion that the judgment of the Court of Appeal ought to be reversed. But I desire to add an observation on the suggestion made in argument for the respondent, to the effect that the real as well as the professed purpose of the Legislature in passing the Act of 1866, was simply to alter the form of the oath, and not to disturb the rights of private persons who were previously entitled to sue for penalties. A careful comparison of the provisions of the Act in question with those of the statutes which it repeals, has tended to strengthen my impression that it is incompetent to refer to these statutes for the purposes of the present case; but, assuming reference to them to be competent, I do not think it would assist the respondent's contention.

It is true that the preamble of the Act of 1866 sets forth, as the inducement to legislate, that "it is expedient that one uniform oath should be taken by members of both Houses of Parliament on taking their seats in Parliament." Although the professed object of the Act is thus limited, it is manifest that the Legislature have gone far beyond it, and have altered not merely the form of the oath, but the penalties attached to sitting or voting without having taken it, or having made an equivalent affirmation. Instead of a pecuniary mulct of £500 in terms of the repealed statutes they have imposed cumulative penalties of that amount for each and

every act of voting or sitting during debate. They have omitted, and by that omission have abolished, the numerous personal disabilities inflicted on offending members by the statutes. They have left out the important words "to be recovered by him or them who shall sue for the same" which occur in all the previous enactments, and have also left out the power to sue before the Court of Session, or the Court of Justiciary, which was given by the Act of 1 Geo. 1, st. 2, c. 13, not improbably for the convenience of common informers residing in Scotland. I see no reason to suppose that all these omissions were accidental, and as little reason to suppose that the enactments with regard to personal disabilities were intentionally left out, whilst the express mention made of common informers was omitted through accident or inadvertence.

LORD FITZGERALD :—

My Lords, the plaintiff's cause of action and claim as appearing on the writ of summons are as follow :—"That the said Charles Bradlaugh voted and sat in the House of Commons during a debate, after the speaker had been chosen, without having made and subscribed the oath to be taken by members of the House of Commons, according to the statute 29 & 30 Vict. c. 19, intituled, 'An Act to amend the Law relating to Parliamentary Oaths,' and the defendant thereby became liable to pay to the plaintiff the said sum of £500 pursuant to the said statute, and the plaintiff claims the said sum of £500." Your Lordships are not asked to determine whether or not the defendant incurred and became liable to that penalty of £500. The defendant does not now raise that question for a reason alleged by him at the bar, and it is not now before us. We must assume that the judgment of the primary Court, affirmed by the Court of Appeal, is correct in determining that the defendant did incur the penalty of £500. The question now is, does the law require him to pay that sum to the informer suing for it ?

This question was not raised before Mr. Justice Mathew, and when raised in the Court of Appeal appears to have been argued very shortly on the part of the defendant and not at all on the part of the plaintiff. The reply of the plaintiff's counsel on this

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question is given in one short passage in the 7th Queen's Bench Division, 48, 49, thus: "The plaintiff can sue as a common informer; if the argument for the defendant were to prevail the penalty could not be recovered by anyone." The argument for the plaintiff (respondent at your Lordships' bar) was equally concise.

The reasons given for the decision in the Court of Appeal on the question before us did not seem to meet your Lordships' concurrence, and have now been considered by your Lordships to have been insufficient, and in that I concur.

There is one part of the observations of the Judges in the Court of Appeal from which I do not dissent. Lord Justice Lush is represented to have said, "The statute does not in terms say who shall have that penalty, or who shall sue for it, and if the words had simply been 'by action,' I am inclined to think at present it would have belonged to the Crown alone;" and Lord Bramwell says, "Still if the words had merely been 'to be recovered by action' . . . . I should have had some doubt whether we should be justified in coming to the conclusion at which we have arrived." I understand, my Lords, from these passages that both the Lords Justices would probably have considered that the plaintiff could not have maintained his claim if the 5th section of the Parliamentary Oaths Act had not contained the words "in one of her Majesty's Superior Courts at Westminster." I concur in that expressed view of Lord Justice Lush and would think it quite clear in such case that the plaintiff could not have the penalty.

The defendant rested his contention on two main propositions, which, he suggested, not only displaced the reasons of the Court of Appeal, but entitled him to judgment, and which may be thus stated. First, that where a statute imposes a penalty as a punishment for an offence, that penalty when incurred, belongs to the Crown, unless the statute provides otherwise, either expressly or by distinct or particular terms, or unless from the language of the statute and its subject-matter, and the machinery provided for enforcing the penalty, it can fairly and reasonably be inferred that the Legislature intended to give it to the informer; and second, that where the Crown is alone entitled to such a penalty,

the suit to enforce it may be instituted by the Crown in any of the superior courts.

The authorities and precedents referred to seem to me to support both these positions. As to the first, the case in Sir Francis Moore's printed reports, p. 238, case 373, is very high authority. He has always been esteemed as a learned and accurate lawyer, and his reports, first known in MSS., were published by his son-in-law, Sir Geoffrey Palmer, also a distinguished lawyer. The report in Moore gives the distinctions taken by Chief Baron Manwood, that where it is ordained by statute that for feasance, misfeasance, or nonfeasance, the offender shall forfeit a sum of money, and it is not expressed to whom he forfeits it, in all such cases the forfeitures shall be intended for the Queen, save in cases of injury to property where the penalty is assessed as compensation to the party injured; and in Bacon's Abridgment, title, "Prerogative," B. 10, vol. 6, the proposition is stated thus on the authority of Moore:—"Also where a statute giveth a forfeiture either for nonfeasance or misfeasance, the King shall have it, unless it be otherwise particularly directed by the statute."

The proposition so laid down by Chief Baron Manwood, nearly three centuries ago, is but a statement of the law deduced from previous authorities, and is now quite unassailable. It is essential to the due enforcement of the law that it should be so, for if the penalty did not in such a case go to the Crown it could not be enforced at all. It seems equally clear from the authorities and precedents referred to by the Lord Chancellor, that it is incontestable law that in such case the Crown has a prerogative right to sue for the penalty in any of the superior courts, and is not confined to an information in the Exchequer.

I was not able to collect from the argument for the plaintiff that so far there was any real controversy. The question still remains to be considered, whether it can be reasonably and fairly collected from the Parliamentary Oaths Act, that the Legislature intended that the penalty imposed by that statute as part of a punishment for what it calls "such offence" should be recovered by and belong to the first informer who should sue for it. The statute does not express such an intention. It does not say that

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the penalty shall be forfeited to, or be paid to, or be recoverable by the common informer; and the omission of the common form of words, "to be recovered by him or them that shall sue for the same," and which are to be found in the 17th section of the statute of George I., which was then being repealed, seems to me to be a pregnant argument against the inference of an intention to do that which it has abstained from expressing. We cannot suppose that the omission of those words arose from ignorance of the law or from inadvertence.

I am disposed as much as any one to venerate the old canons for interpretation of statutes, sanctioned by the acquiescence of ages, as aids to us in the solving of ambiguities, and relieving us from doubts; but I apprehend that we should go much beyond what has hitherto been done if we were to adopt an interpretation favourable to the plaintiff, and for that purpose read the statute now before us as implying an intention to confer a right which it does not expressly give.

I prefer to guide my judgment by the rule of construction laid down in *Warburton* v. *Loveland* (1), and so often quoted, approved of, and followed. Mr. Justice Burton there says, "I apprehend it is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no farther."

The language of the statute now before us does not appear to me to be open to ambiguity; and, having regard to its subject, it does not present to my mind any such difficulty of interpretation as would warrant us in departing from or adding to the ordinary sense of its terms, and we give effect to every word of it whilst holding that no right is given to the informer. The statute takes away no common law right, but we are asked by the plaintiff to give effect to a supposed intention of the Legislature to confer a right which it has not created.

In the course of the argument, it was suggested that yielding

(1) 1 Hudson & Brooke, 648.

to the defendant's contention would be to give to the Government of the day in effect a dispensing power; but if such an argument could have any just weight, it would not be difficult to point out weighty reasons why the Legislature may have considered it better not to give a right of suit to the common informer, in whose hands it might be made an engine of oppression, and rather to leave the enforcement of the law in all proper cases to the Attorney-General, responsible to the Crown and to Parliament for the due performance of his duty.

I adopt entirely the reasons given by the Lord Chancellor for what is now to be the judgment of this House. The Parliamentary Oaths Act is "An Act to amend the law relating to Parliamentary Oaths." It repeals the 17th section of the statute of George I., and does not re-enact its provisions. It substitutes a new oath, or an affirmation instead. It creates a new public misdemeanour, imposing a penalty as a punishment, and does not in any manner *express* an intention that such penalty shall go to or be recovered by any one who shall sue for it; and I think it would be a dangerous enlargement of our powers of interpretation if we were to come to the conclusion that because it has enacted that the penalty may be enforced "in one of Her Majesty's superior Courts at Westminster," we are therefore to infer an intention that the penalty should go to and be recoverable by the common informer.

Orders appealed from reversed: action dismissed with costs: the respondent to pay the costs of this appeal: cause remitted to the Queen's Bench Division.

Lords' Journals 9th April 1883.

Solicitors for appellant: *Lewis & Lewis.*
Solicitors for respondent: *Stuart & Tull.*

[HOUSE OF LORDS.]

H. L. (E.) 1883 April 24.

THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF WEST HAM, ESSEX . . . . . } APPELLANTS;

AND

HENRY WILLIAM ILES . . . . . RESPONDENT.

Poor-rate—Owner rated instead of Occupier under "Sturges Bourne's Act" 59 Geo. 3 c. 12 s. 19.

The owner of a house let "on any agreement by which the rent is reserved or made payable at any shorter period than three months," cannot be assessed to the poor-rates instead of the actual occupier under Sturges Bourne's Act (59 Geo. 3 c. 12) s. 19, if the rent is at a rate which amounts to more than £20 by the year:—

So *held*, affirming the decision of the Court of Appeal.

APPEAL from a decision of the Court of Appeal (Lord Coleridge C.J. and Brett L.J., Baggallay L.J. dissenting (1)) which reversed an order of the Queen's Bench Division.

The facts are fully set out in the report of the decision below (1). The question raised by the appeal was whether the respondent, as owner of houses let to actual occupiers on weekly tenancies at weekly rents which, if multiplied by fifty-two, would amount to more than £20 by the year, was liable to be assessed to the poor-rate instead of the actual occupiers, he having been assessed under a resolution passed by the vestry of West Ham by virtue of 59 Geo. 3 c. 12 s. 19.

That section is in these terms: "And whereas in many parishes, and more especially in large and populous towns, the payment of the poor's rates is greatly evaded, by reason that great numbers of houses within such parishes are let out in lodgings, or in separate apartments, or for short terms, or are let to tenants who quit their residences or become insolvent before the rates charged on them can be collected; and it hath been found that in many instances the persons letting such houses do actually

(1) 8 Q. B. D. 69.

charge and receive much higher rents for the same upon the ground and expectation that the occupiers thereof cannot be effectually assessed to the poor's rates and will not be charged with or required to pay such rates, and do thus obtain an undue advantage to themselves; and by means of the premises the other inhabitants of such parishes are unjustly compelled to pay much more than their fair and due proportions of the charges of relieving and maintaining the poor: For remedy thereof be it further enacted, that from and after the first day of January one thousand eight hundred and twenty it shall be lawful for the inhabitants of any parish in vestry assembled, and they are hereby empowered, to resolve and direct that the owner or owners of all houses, apartments, or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding twenty pounds, nor less than six pounds by the year, for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor, for or in respect of such houses, apartments, or dwellings, and the outhouses and curtilages thereof, instead of the actual occupiers; and the inhabitants so assembled in vestry may and they are hereby authorized from time to time to rescind, renew, vary, and amend every such resolution and direction as they shall see occasion, so as no such resolution or direction shall extend to assess or charge the owner of any house, apartments, or dwelling which shall with the outhouses and curtilages thereof, be let at a greater rent than twenty pounds or less than six pounds as aforesaid; and the churchwardens and overseers of the poor of every such parish are hereby empowered and required to carry into effect all such resolutions and directions of the inhabitants in vestry assembled, and in pursuance and execution thereof, in all rates to be by them made for the relief of the poor, to assess by a fair and equal pound rate the owner or owners, being the immediate lessor or lessors of the actual occupier or occupiers, of every house, apartment, or dwelling to which such resolution and direction shall extend, for or in respect of the same, according to the actual rent at which every

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such house, apartment, or dwelling shall be let, after making a reasonable deduction from such rent, not exceeding in any case one-half of the same; and upon non-payment of the sum or sums so to be assessed, the same may and shall be levied upon and the payment thereof be enforced against such owner and owners, lessor and lessors, so to be assessed, and his and their goods and chattels, in like manner as rates for the relief of the poor may by law be levied and recovered, and the payment thereof enforced, upon and against any actual occupier on whom the same are charged."

F. M. White Q.C. and *Mugliston* for the appellants:—

The appellants allege and the respondent denies that the words "let at any rent or rate not exceeding £20 nor less than £6," apply only to lettings at a rent or rate *by the year* "for any less term than one year," and do not govern the words "or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months." Upon the true construction the words "or on any agreement etc." have reference to such tenancies as ordinary weekly or monthly tenancies, whatever be the amount of rent reserved. The proviso furnishes no argument against this view, for it is confined to houses &c. "let at a greater rent" (omitting "or rate") "than £20 or less than £6 as aforesaid," that is, at a rent or rate by the year for any less term than a year; and it does not repeat the words "or on any agreement &c." Upon any other construction the object of the Act as shewn by the preamble would be defeated.

No counsel appeared for the respondent.

LORD BLACKBURN:—

My Lords, in this case the whole question turns upon the construction of sect. 19 of 59 Geo. 3 c. 12. I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of Parliament where the intention of the Legislature is declared by the preamble we are to give effect to that preamble to this extent, namely that it shews us what the Legislature are intending; and if the words of enactment have a

meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one shewing an intention of the Legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material.

Lord Blackburn.

The preamble of the section in question states that the payment of rates is evaded by houses being "let out in lodgings," in which case I may observe that those who framed the preamble did not understand the law as it is perfectly settled now. A man who lets out houses in lodgings, and who is the occupier, is himself liable and the lodgers are not. The preamble proceeds to say, "or in separate apartments," in which case the occupier of the separate apartments is rated, "or for short terms, or let to tenants who quit their residences or become insolvent before the rates charged on them can be collected." That is the evil which is pointed at, and then the section enacts a remedy for it, "that it shall be lawful for the inhabitants of any parish to resolve and direct that the owner or owners of all houses, apartments or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof" (for the moment I will leave out the next line and a half) "for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor instead of the actual occupiers." Now stopping there, (I have left out the limitation as to value altogether,) there are two things as it seems to my mind—where there has been a letting to the occupier of a tenement for any less term than one year the lessor may be rated instead of the occupier, or where there has been a letting to the occupier, and by the terms of the agreement the rent is made payable at any shorter period than three months, the lessor may be rated instead of the occupier. So far I think there can be no doubt about the matter. But it is very improbable that the Legislature would have passed any such enactment without some limit of value; and accordingly there are here the words "at any rent or rate not exceeding £20 nor less than £6 by the year." Those words are put in immediately after the words "let to the occupiers thereof"—and

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the first question is upon the natural and grammatical construction of the words. Should they apply to a letting for any less term than one year or on an agreement by which the rent shall be reserved or made payable at any shorter period than three months? Or are they to be confined to the case where the letting is for less than a year, and is there to be no limit of value whatever applicable to the case where there is a letting and the rent is reserved or made payable at a shorter period than three months? I think that the plain and natural meaning of the words is that they shall extend to both cases—the value must govern both classes.

Now it is said (and that is the only argument which to my mind seemed to amount to an argument in favour of the other side) that the effect of that construction would be to baffle the preamble, and that it would be necessary for the purposes of the preamble for us to say that whenever there are short terms of letting, not by taking in lodgers but by the letting of an actual room, for a sum which exceeds 7*s.* 8*d.* a week (so says the argument) the Legislature are baffled in their object, which was to prevent the rates being evaded. But that I cannot see at all. I think that for that purpose it is possible enough that if their attention had been called to it they might have put some limitation; but to say that in order that they may not be baffled of their purpose, which was with respect to the letting of small lodgings at a small rent, the enactment shall apply, without stint or restriction of any sort, to a house which is let (as a house may well be let) to a person who is not inclined to take it for a long time but who is willing to pay at the rate of thousands a year for it provided always that the rent is reserved or made payable monthly,—to say that that is necessary in order to carry out the preamble is not, I think, in accordance with the rules of construction, and is not such a construction as it would be prudent to adopt.

Then the words which I have read are followed by what has been called a proviso. When the inhabitants have come to this resolution or declaration they "may rescind, renew, vary and amend every such resolution and direction." Then come the words "so as no such resolution or direction shall extend to

assess or charge the owner of any house, apartments or dwelling which shall with the outhouses and curtilages thereof be let at a greater rent than £20 or less than £6 as aforesaid." If it were not for these two words "as aforesaid" there could not have been any possible doubt, I think, that this provision extends not merely (as was attempted to be argued) to the rescinding, renewing, varying and amending but to the original resolution and direction, the first resolution and direction as well as those subsequently made. The houses, apartments or dwellings are not to be "at a greater rent than £20 nor less than £6." The words "as aforesaid," it is argued, shew that this is intended only to apply to a letting for a period of less than a year. I must say that that is straining the words.

I have come to the conclusion therefore that the decision of the majority of the Court of Appeal was the right one, and consequently I move that that judgment should be affirmed and the appeal dismissed. As there is no one appearing for the respondent, there is no occasion to say anything about costs.

LORD BRAMWELL:—

My Lords, I am of the same opinion. The question is how these words are to be read. Mr. White proposes to read them as though the words beginning with "or on any agreement" were not connected with the immediately preceding words, which occupy about two lines, but were connected with the words ending at "occupiers thereof;" so that he would read them as though after the words "one year, or," there was the word "let." Now if that were so, he would be in the right. If not, if what comes after the words "one year" is a part of the sentence which begins at "any rent or rate," then he is not right. I am of opinion that he is not right. I think that I will not say the grammatical construction, because either construction is in my judgment grammatical, but the ordinary and obvious construction is that which is unfavourable to him, and which makes it necessary that although the premises are let under an agreement by which the rent reserved is made payable at any shorter period than three months, still the rent shall not be more than £20 to enable this Act to be acted upon. I think that is the ordinary construc-

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tion of the sentence as it stands; and it is confirmed to my mind by what has been called the proviso, which shews that those who were drawing the Act of Parliament thought that they were dealing with a case in which they had provided that the rent should not exceed £20.

Lord Bramwell.

Nor am I very much struck by the argument about the preamble. I daresay mischief may result from the law being as we state it to be; I do not however see but what the preamble is complied with upon either construction. There is this at least to be said, that if premises were let for three months at £7, clearly that case would not be within the Act of Parliament; and that being so, I do not think that we ought to suppose that the Legislature intended that if they were let for two months whatever the value was, this Act of Parliament should apply.

I am of opinion therefore that the judgment should be affirmed.

LORD FITZGERALD:—

My Lords, I should have thought this an exceedingly plain case if it had not been for the judgment which was delivered in the primary Court by Baron Huddleston; but as it is, I shall content myself with saying that it appears to me now, after hearing the argument, to be clear that the limit of £20, "not exceeding £20," twice mentioned, determines the whole question. Therefore my opinion is that the decision of the Court of Appeal is right.

Judgment appealed against affirmed, and appeal dismissed.

Lords' Journals 24th April 1883.

Solicitor for appellants: *G. A. Sedgwick.*

[HOUSE OF LORDS.]

JOHN CORY & SONS . . . . . APPELLANTS;

AND

ALBERT EDWARD BURR . . . . . RESPONDENT.

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Insurance, Marine — Policy — Barratry — Warranty free from Capture and Seizure.

In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure and the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release :—

Held, affirming the decision of the Court of Appeal, that the loss must be imputed to "capture and seizure" and not to the barratry of the master, and that the underwriter was not liable.

APPEAL by the plaintiff from a judgment of the Court of Appeal (Lord Coleridge C.J. Brett and Cotton L.JJ. (1)), affirming a judgment of the Queen's Bench Division in favour of the defendant (2).

The facts are fully set out in the reports of both decisions below. The statement in the head-note is sufficient for the purposes of this report.

April 27, 30. *Webster* Q.C. and *Tyser* (*Myburgh* Q.C. with them) for the appellants :—

The capture and seizure in the warranty must be limited to cases of a wrongful or hostile taking of the vessel out of the hands of the owner; the warranty was originally intended to cover belligerent captures and perhaps captures by pirates, never a rightful seizure by a foreign tribunal: *Powell* v. *Hyde* (3); 2 Arnould on Insurance 4th ed. p. 699; Phillips on Insurance §§ 1108, 1154. Capture and seizure denote attempts made on the vessel adversely to the captain and crew from outside, and their

(1) 9 Q. B. D. 463. (2) 8 Q. B. D. 313.

(3) 5 E. & B. 607.

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meaning has never been carried further than that. Exceptions are to be construed strictly against the underwriter: Duer vol. i. lect. ii. part i. § 6 p. 161; Phillips on Insurance §§ 131, 1160; or "as if the assured had reinsured against the perils which are excepted by the warranty:" per Erle C.J. in *Ionides* v. *Universal Marine Insurance Company* (1). The seizure in this case was not one contemplated by the warranty, it was only an incident and consequence of the barratry, and the maxim "proxima causa non remota spectatur" is not applied to the case of barratry; 2 Arnould on Insurance 5th ed. p. 773. As a barratrously caused deviation does not avoid the policy, so a barratrously caused seizure, that is, a capture or seizure to punish the barratry, does not exonerate the underwriter: *Vallejo* v. *Wheeler* (2); *Waters* v. *Merchants' Louisville Insurance Company* (3), which is a strong authority on the very point. See also *Roscow* v. *Corson* (4). A seizure for barratrous illicit trading has been held not to be within the warranty: *American Insurance Company* v. *Dunham* (5); *Havelock* v. *Hancill* (6); *Suckling* v. *Delafield* (7). A smuggling loss is always treated as a loss by barratry, and not by "arrest, &c." The seizure was an intermediate not a continuous act. The barratry was the effective cause of the loss, and has always been so treated: *Heyman* v. *Parish* (8). *Livie* v. *Janson* (9) is explained in *Hahn* v. *Corbett* (10). The warranty may be read "free from capture or seizure unless caused by barratry." The warranty means either that the ship was free from loss by the excepted perils at the time when the policy attached; or that the underwriter was free from loss caused by the excepted perils. If the first, the warranty was complied with; if the second, there was no loss by capture or seizure. "Arrest of princes" being expressly insured against and arrest being a species of seizure, the species was intended to be excepted out of the general class of risks mentioned in the exception. *Kleinwort* v. *Shepard* (11) carried "seizure" too far.

(1) 14 C. B. (N.S.) at p. 285. 16 Jan 1820
(2) 1 Cowp. 143.
(3) 11 Peters U. S. Rep. 213.
(4) 8 Taunt. 684.
(5) 12 Wend. Rep. N. Y. 463; 15 Ibid. 9.
(6) 3 T. R. 277.
(7) 2 Caines, 222.
(8) 2 Campb. 149.
(9) 12 East, 648.
(10) 2 Bing. 205, 211.
(11) 1 E. & E. 447. 8 Jan 1858

Cohen Q.C. and *J. Gorell Barnes* for the respondent were not called on.

EARL OF SELBORNE L.C.:—

My Lords, this is an appeal from a unanimous judgment of the Court of Appeal affirming a unanimous judgment of the Queen's Bench Division. The case has been argued with great ability; but your Lordships have had sufficient time to consider the effect of those arguments, and I believe that all your Lordships agree that it is not necessary to call upon the counsel for the respondent.

I am by no means sure that it might not be sufficient for me to say simply that I agree with the judgments given by Mr. Justice Field and by Mr. Justice Cave and also with the reasons which they gave for those judgments and with the reasons which were given in the Court of Appeal. I will however make one or two observations upon the principal points on which the case depends. Everything depends upon the construction of the words of the warranty in the policy, the warranty being "free from capture and seizure and the consequences of any attempts thereat."

The first question which has been considered in the argument has been, What is the meaning of the words "capture and seizure?" "Warranted free" clearly means that the insurers are not to be liable for the things to which the warranty applies. I own I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument, and which Lord Justice Brett seemed to think might have influenced him if there had not been authority against it,—the view I mean that "capture and seizure" in such a warranty must be taken to mean primâ facie belligerent capture and seizure only. My reasons for saying so are that the word "seizure" is used as well as the word "capture." I am disposed to agree that if the word "capture" had stood alone it might have appeared to point to a belligerent capture, but the addition of the word "seizure" is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word "capture" and to let in other "seizures," such as Lord Justice Cotton suggests, by means of the revenue laws of a foreign state.

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The facts of this case shew what the nature and effect of such a seizure is. The ship was seized in every sense we can put upon the word "seize." It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy or the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship. And the case states that that would have been the result of the seizure which took place in the present instance if money had not been paid to redeem the ship from that confiscation and total loss. To my mind those facts are properly described by the word "seizure" in its natural sense, and unless there is something else in the policy to shew that the word was meant to bear a different sense not inclusive of such a state of facts, I should have said in the absence of authority that they were included.

But there are two authorities which shew at all events that these words in such a warranty cannot be restrained to a belligerent capture. In the case of *Kleinwort* v. *Shepard* (1) there was a seizure by mutinous emigrants on board; an act which might be described as piracy on the part of those emigrants, undoubtedly, and might therefore have come within the word "pirates" as mentioned in the policy; but it was not a belligerent seizure beyond all doubt. And in the other case, *Powell* v. *Hyde* (2), there was no belligerent capture; the ship was shot at and sunk by a friendly power under an alleged mistake. That would certainly not be a belligerent capture, but it was regarded as a "capture" in the sense which was to be obtained from the juxta-position of the words "capture" and "seizure" and the comparison of them with the other words which occur in the body of the policy and which shew that it was meant to cover all sorts of losses of that kind; losses by "men-of-war," losses by "enemies," losses by "pirates," by "rovers," by "takings at sea," by "arrests, restraints and detainments of all kings, princes and people."

Therefore both on authority and on principle I reject the idea that these words "capture and seizure" can be so narrowly

(1) 1 E. & E. 447. 5 Jur. N.S. 863. (2) 5 E. & B. 607. 2 Jur. N.S. 587.

construed as to exclude such a seizure as that which took place in the present case.

But then it is contended that, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made upon the footing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty. Suppose the case of a belligerent capture: that belligerent capture is as much attributable to "men-of-war," or to "enemies," to "taking at sea," as any seizure by reason of barratry can be attributed to barratry—indeed more directly and immediately. Men-of-war and enemies might or might not have taken the ship, but their coming into contact with the ship, their firing at her, their placing her in a position of jeopardy, is the first step towards "capture or seizure" which is its consequence. Then the argument, if it is sound as to barratry, would seem to be sound as to "men-of-war" and "enemies" also, that because there is an express insurance against those things, therefore a "capture or seizure," and consequently an attack by "men-of-war" or by "enemies," is to be taken out of the warranty. I might follow it further as to "pirates," as to "restraints and detainments of kings, princes and people." It is quite manifest that the object of this warranty is and must be to except such losses otherwise covered by the policy, otherwise coming within the express terms of the policy, as arise out of and are losses occasioned by "capture or seizure." That appears to me to be equally the case whether remotely it was occasioned by barratry or not—in fact the remoter it is the stronger the argument that it must be the case as to barratry.

Therefore I entirely agree both in the conclusion and in the reasons of the two Courts below.

LORD BLACKBURN:—

My Lords, I also agree entirely with the result to which the Courts below have come; and with one exception, which perhaps is not very material, I agree with their reasoning. But I think

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it is necessary to say that I do not at present agree with one thing said. A passage was cited from the last edition of Arnould on Insurance, which I now find was in the first edition by Sir Joseph Arnould, it is in vol. ii., p. 838 of the first edition. He has there laid down that whilst it is very true that the general rule is that in insurance you look to the proximate cause and not the remote one, there is an exception in the case of barratry and that the remote cause may be looked to there. I can only say that I think there is no other authority for such a rule; and though certainly Mr. Justice Field and Lord Justice Brett seemed to suppose, naturally on the authority of that statement in the text-book, that this was a rule of insurance law, I as at present advised do not think that it is. The very instances which are given in the passage from Arnould are instances in which the Courts thought rightly or wrongly (I think rightly) that the cause of loss was barratry, and that the consequence for which the parties were entitled to be indemnified was not a remote consequence. That is all I say upon that part of the subject. I am merely putting in a protest against what may be hereafter cited as being an established principle of insurance law. For my own part I do not think that it is.

Proceeding from that to the rest of the case, I thoroughly agree in the judgments which were pronounced below. The policy here is in the ordinary Lombard Street form, which has been in use for more than a century, and contains the ordinary enumeration of the perils against the loss from which the underwriters undertake to indemnify the assured. Many of these, as for instance men-of-war, enemies, pirates, rovers, and I may add barratry of the master and mariners, do not in themselves necessarily occasion any loss; but when by one of those the subject assured is taken out of the control of the owners there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get, their property back: *Dean* v. *Hornby* (1). There are other perils, such as takings at sea, arrests, restraints and detainments of princes, which from their nature involve such a taking of the subject insured out of the control of the owners. That being the case, supposing there had been no warranty at all, was there a

(1) 3 E. & B. 180. 18 Jur 624

loss here which would be one for which the underwriters would be liable? Upon the facts stated I cannot doubt it. The definition of barratry in the case of *Earle* v. *Rowcroft* (1) has never been departed from. The effect of that case is that the act of a captain, for his own purposes and to serve his own ends, engaging in a smuggling transaction which might tend, and in fact in this case did tend, to the injury of his owners and to the ship being seized, is barratry. The captain in the present case had done that—he had employed the ship for the purpose of carrying tobacco. When he was off the coast of Spain he caused the engines to be stopped to look out for the ship into which he had intended to trans-ship the tobacco in order that it might be smuggled; and he proceeded "dead slow" while he was looking out for that vessel. That was a clear case of barratry. While he was doing this "two craft came alongside with Spanish revenue officers on board, who seized the ship and took her into Cadiz."

Now first of all was that act of the two Spanish revenue officers in taking and seizing this ship in itself one of those matters which would be covered by the insurance against the enumerated perils? I cannot myself doubt that it was. I cannot doubt that it came quite within the terms "restraints and detainments of all kings princes and people," namely the Government of Spain; and their seizing the vessel was, I think, a thing for which the owners might have recovered under that head. But it was also, I think, not at all a remote but a direct and immediate consequence of the barratrous act of the captain, and it might therefore have been recovered for in the old times, when we were particular about pleadings, under a count in which it was laid as being barratry and the loss as being a consequence of it. The case that was referred to of *Havelock* v. *Hancill* (2) is a case where the plaintiff recovered on a count for barratry which in itself would not occasion any damage, but it was held good on demurrer, the count alleging almost identically the same thing as happened here, except that the seizure was by the English Government for smuggling against the English law, instead of being by the Spanish Government for smuggling against the Spanish law. That was a case in which the underwriters were held to be responsible; and I think myself that they might also have been held responsible if the

(1) 8 East, 126. (2) 3 T. R. 277.

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count had alleged the loss to be occasioned by restraint of princes.

Now comes the question, Does this warranty free the underwriters from that responsibility? That is the main question. First let us see what the warranty is. There are warranties such as those which were referred to in the ingenious argument that we have last heard, which in effect merely say, We will define the sort of adventure which you shall be engaged in when we are to indemnify you; for example it shall be warranted that the ship shall not sail anywhere except in the Mediterranean, or something of that sort, defining the risk which they are to encounter; and if the ship goes out beyond that distance, then it is like a deviation—she has incurred a different kind of risk from that which the underwriters undertook to bear—it has become altogether a different adventure. That is one description of warranty. But there is another, which has been for a long time used, expressed in the phrase "warranted free from" particular things. I need only point, as I did in the course of the argument, to the ordinary warranty, which is printed at the foot, and has been so for more than a century, known as the memorandum—"Corn, fish, salt, fruit, flour, and seed are warranted free from average unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under £5 per cent.; and all other goods, also the ship and freight, are warranted free from average under £3 per cent. unless general or the ship be stranded, sunk, or burnt." That kind of warranty, "warranted free" in that sense, means that although the general terms of the policy would have covered this, yet considering the special riskiness of the particular matter the underwriters, unless they are paid a premium for consenting to take it in, do not choose to be liable where the particular thing happens which they have stipulated by this warranty that they shall be warranted free from. Now here they are "warranted free from capture and seizure and the consequences of any attempts thereat." It was argued that here they have not been warranted free from barratry. That is true, but the barratry would itself occasion no loss at all to the parties insured. If it had not been that the Spanish revenue officers, doing their duty (they were quite right in that respect), had come and seized the ship, the barratry of the

captain in coasting along there, hovering as we should call it along the coast, in order that the small smuggling vessel might come and take the tobacco, would have done the assured no harm at all. The underwriters do undertake to indemnify against barratry; they do undertake to indemnify against any loss which is directly sustained in consequence of the barratry; and in this case, as I said before, I think the seizure was as direct a consequence of the barratry as could well be. But still, as Mr. Justice Field says, it was the seizure which brought the loss into existence—it was a case of seizure. Then why should it not be protected by this warranty?

The American cases which have been referred to are quite different; they are founded upon the English case which I have already cited, *Havelock* v. *Hancill* (1). There the ship was insured "in any lawful trade," and if it had been not a lawful voyage it would have been like a deviation—it would have been a different kind of adventure from that of which the underwriters took the risk. The fact of its being not a lawful voyage would have made it one for which they had not engaged to be responsible. The underwriter in that case might have said, "Non hæc in fœdera veni. I have engaged to indemnify you against the risks of a lawful voyage; you engaged in an unlawful voyage." But the answer was, "This was not an unlawful voyage, for what was done here was to engage in a lawful voyage, and the barratry of the captain did not make that voyage unlawful." The decision has stood now for a century and has not been quarrelled with. I should have thought that that was as plain a decision as one could wish for. The American Courts upon that, with some want of logic I cannot help thinking, drew the inference that where there was a warranty "free from seizure or detention on account of illicit trading" they were to hold that it was to be an illicit trading to which the insured was a party (I think that is what it comes to) or at least to which the owner of the ship was a party. I think that that is an illogical consequence, and I do not approve of the reasoning by which it was come to. But it is sufficient to say that it has nothing to do with the present case. There are no such words here used as "warranted free from capture or seizure

(1) 3 T. R. 277.

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in consequence of illicit trading," if that would have made any difference.

The question then is reduced, as it seems to me, to this. When the whole loss was occasioned by that which was certainly a "seizure," is it within the meaning of the warranty? I say certainly it is. If it were perfectly res integra there would be something to be said in favour of holding that "capture and seizure" ought to be limited, or might be supposed to be limited, to belligerent risks, risks in time of war, although I think that there would be a great deal to be said against it. But the point is not new. In *Kleinwort* v. *Shepard* (1) the seizure was in nowise connected with the act of foreign princes or their subjects, it being the act of coolies, who were not pirates in the sense of being assailing thieves, for they were lawfully in the ship; they were passengers who rose in mutiny; they were not barratrous, for they were not the captain nor the crew; but it had been held in the case of *Palmer* v. *Naylor* (2), which I argued myself, that whether they were pirates or whether they were not (they were, it was argued, not pirates because they were in the ship, they were not barratrous because they were not the crew of the ship) it was quite clear that they were ejusdem generis, and consequently they came within the words "other perils." I remember an illustration which I used in the argument and which was adopted, I think, by the Court—it was this—I said that the case was like the bat in the fable, which said, "I am not a bird, look at my ears. I am not a beast, look at my wings." "But," said I, "if the words had been 'birds and beasts and all other animals'" surely a bat would have been included; and I think that the noble and learned Lord opposite (Lord Bramwell) who argued against me felt that he could not resist that. It was at least another peril which was clearly covered. Now in the case of *Kleinwort* v. *Shepard* (1) it was decided that a seizure of that sort was a seizure within the perils which were warranted against. That is in fact a much stronger decision than the present. All that it is necessary to say in the present case is that the warranty is against a seizure by a power. I do not say at all that *Kleinwort* v. *Shepard* (1) is not perfectly right. I only say that it goes further than is required here; and

(1) 1 E. & E. 447. 5 Jur. N.S. 863 (2) 10 Ex. 382. 18 Jur. 961

I also say that when a decision has been acted upon for thirty years, as to the construction of such words as these, it requires some very strong reasoning to justify one in saying that we should now hold that where people have used these identical words, knowing the meaning which has been previously put upon them by a judicial decision, they do not mean the same thing. Consequently I think that strong reasoning will be required for reversing the case of *Kleinwort* v. *Shepard* (1). But it is enough to say that this was a seizure, being the act of the power which made that seizure, and therefore that the Court below are perfectly right in the conclusion at which they have arrived.

LORD BRAMWELL:—

My Lords, I am of the same opinion. What was in contemplation by the parties in this case may be very doubtful; and I should have thought that it was very doubtful also what was the meaning of these words originally; but a meaning has been put upon them, and that meaning having been acted upon, I think it is desirable that it should be abided by; because undoubtedly people who make contracts make them in reference to the well-understood meaning of such words, and if that meaning is an inconvenient one they can alter the words.

I think that the meaning of the words which are here to be construed is now plain. The warranty is a warranty "free from capture and seizure;" it is perfectly general in its terms. If the vessel has been captured or seized, and a loss has been thereby occasioned, it is within the warranty. Now it is said here that the loss was not from the seizure but that in truth it was from the barratry; and it is ingeniously suggested by Mr. Tyser that the seizure was "an intermediate step," as he called it. But it was the ultimate and final step which occasioned the loss; and but for the payment of money the ship would have been confiscated, which would have been merely a following up of the seizure. One might put this case; suppose the ship had been confiscated and sold, and then the Spanish government upon some representations made to them had returned a portion of the proceeds, would there not have been a loss by seizure? There

(1) 1 E. & E. 447.

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would; and is it not equally so now? To my mind that point is really not tenable.

But then it is said that when barratry is the causa remota of the loss, it nevertheless may be relied upon without reference to the causa proxima. Now I will say nothing as to any general rule except to express a doubt as to whether what Lord Justice Brett said about that matter is perfectly correct. I have a misgiving about it; but I do not consider it necessary to determine anything of that sort here. It is possible that in some cases, where there has been barratry and a consequent loss within the perils insured against, you might call that a loss by barratry. In my opinion you cannot do so in this case. Call it an ultimate loss if you like, that ultimate loss was caused by a seizure, and that was warranted against.

LORD FITZGERALD:—

My Lords, I entirely agree in the judgment which has been announced by the noble and learned Earl on the woolsack.

The question arises on the proper interpretation of the limitation of the liability of the insurers contained in the clause "warranted free from capture and seizure and the consequences of any attempts thereat." This warranty must be taken to apply to some of the risks previously enumerated and to limit the otherwise unlimited liability of the insurers. On looking back to the enumeration of the perils which the policy was intended to cover, we find some, the generality of which may be the subjects of the limitations expressed in the warranty; for example, "arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes."

The contention of the plaintiffs is that the warranty does not apply where, as in the case before us, the seizure has been the immediate consequence of the barratrous act of the master; and on the other hand the defendant insists on the literal construction of the warranty as embracing all cases in which the ship has been taken forcible possession of by superior power or authority. If the latter construction is to prevail, then the defendant contends that the seizure having been the immediate proximate

cause of the loss, he, the insurer, is exempt from liability. The question seems a simple one, but if we depart from the literal construction we may be led into complications and metaphysical refinements from which mercantile contracts ought as far as practicable to be free.

If the question had now come before us unfettered by authority, and if the decision in the Court below had been in favour of the plaintiffs, I should have been content. But there is one matter to which I have an invincible objection, and that is uncertainty in the interpretation of mercantile contracts. The literal interpretation of the exemption would embrace all cases of capture or seizure which would otherwise have been within the perils insured against; and so far as the authorities have gone, they are in favour of the defendant's contention. I allude to the cases of *Powell* v. *Hyde* (1), and *Kleinwort* v. *Shepard* (2), which have been already commented upon. In the construction of this warranty it is observable that "capture" and "seizure" do not mean the same thing. "Capture" would seem properly to include every act of seizing or taking by an enemy or belligerent. "Seizure" seems to be a larger term than "capture" and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession either by a lawful authority or by overpowering force.

I am quite satisfied with, and adopt, the interpretation put upon these words in the very able judgments of the Courts below, following the views put forward in the case of *Powell* v. *Hyde* (1), decided twenty-four years before this policy was entered into, and in the case of *Kleinwort* v. *Shepard* (2). It was urged upon us that it was unreasonable and unjust as applied to the present case. It appears to me on the contrary that the warranty as now interpreted was a reasonable stipulation for the insurers to make. I find the following to be the definition of "barratry" given by Willes J. in *Lockyer* v. *Offley* (3). "Barratry is every species of fraud or knavery in the master by which the freighters or owners are injured." Now it is obvious that with so large a definition as that, there may be instances of barratry which may be either harmless or effect but a small loss—for instance a deviation, or wilful

(1) 5 E. & B. 607. (2) 1 E. & E. 447.
(3) 1 T. R. 259.

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delay; but barratry may also consist in a very small matter over which the owners or freighters have no control, the effects or consequences of which may be very serious; and I can well understand the prudence of insurers stipulating, "We will not be responsible for seizure caused by some barratrous act of the master or crew, rendering not only the ship but also the cargo liable to confiscation and seizure."

If such be the interpretation which is to be put upon the contract, I ask the question, By what was the loss occasioned? I apprehend that there can be but one answer to this question, namely, that the loss arose from the seizure. There was no loss occasioned by the act of barratry. The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless; but the seizure, which was the effective act towards confiscation, and the direct and immediate cause of the loss, was not because the act of the master was an act of barratry but that it was a violation of the revenue laws of Spain. That was the question which I put to Mr. Tyser in the course of the argument, and to which I received no answer. I asked him, "What was the cause of the loss?"

Now in the same clause of the warranty the words are "warranted free from capture and seizure and the consequences of any attempts thereat." If in place of the Spanish cruiser having seized this vessel, she had failed to seize her, but in the attempt to seize her and in the pursuit had sunk the ship, I should have put the same question, "What caused the loss?" and the proper answer would have been, "Not the barratrous act of the captain but the sinking of the vessel by the Spanish cruiser."

On these grounds I agree that the judgment of the Court below should be affirmed.

Order appealed from affirmed; appeal dismissed with costs.

Lords' Journals 30th April 1883.

Solicitor for appellants: *H. C. Coote* for *H. A. Adamson, North Shields.*

Solicitors for respondent: *Waltons Bubb & Walton.*

[HOUSE OF LORDS.]

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THE LAW SOCIETY OF THE UNITED KINGDOM . . . . . } APPELLANTS;

AND

WATERLOW BROTHERS & LAYTON . RESPONDENTS.

THE LAW SOCIETY OF THE UNITED KINGDOM . . . . . } APPELLANTS;

AND

THOMAS SKINNER (EXECUTOR OF WILLIAM JOHN BLAKE WHO CARRIED ON BUSINESS UNDER THE STYLE OF SHAW & BLAKE) . . } RESPONDENT.

Solicitor—Proctor—Unqualified Person acting as Solicitor or Proctor in obtaining Probate—6 & 7 Vict. c. 73 s. 2—23 & 24 Vict. c. 127 s. 26.

Law stationers, not qualified as solicitors or proctors, were accustomed upon the instruction and in the names of London or country solicitors to take to the registry of the Probate Division original wills and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the stationers communicated it to the solicitors. All the charges between solicitor and client were made by the solicitors, and the stationers charged the solicitors for their clerks' time only:—

Held, affirming the decision of the Court of Appeal, that the stationers had not acted as solicitors or proctors, and were not liable to the penalties imposed by 23 & 24 Vict. c. 27 s. 26.

THESE were two appeals from orders made by the Court of Appeal (Brett, Cotton and Holker L.JJ.). The facts are fully set out in the report of the decision below (1), and for the purpose of this report sufficiently appear in the head-note.

April 30, May 1. Sir *H. Giffard* Q.C. and *G. A. R. Fitzgerald* (*R. T. Reid* Q.C. and *Woodfall* with them) for the appellants in the first appeal:—

The difference in the two appeals is that in the first the soli-

(1) 9 Q. B. D. 1.

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citors who instruct the respondents are country, in the other London, solicitors. A country certificate does not authorize its holder to practise in London; the respondents Waterlow therefore do what their employers themselves could not do. The respondents Waterlow being unqualified are liable to the penalties, having acted as proctors or solicitors, and not merely as messengers. The practice is for them to answer questions put by the probate officials, e.g. as to an appearance of sealing-wax or other marks leading to the inference that another document had been attached, and to arrange difficulties. Many acts are proper in a solicitor which would be improper in an agent, e.g. the issue of writs. For instances of unqualified persons practising as qualified see *Apothecaries Company* v. *Greenwood* (1); *In re Clark* (2). There must be the relation of master and servant between the solicitor and the person employed, to take the case out of the statutes 6 & 7 Vict. c. 73 s. 2, and 23 & 24 Vict. c. 127 s. 26, and the Probate (Non-contentious) rules, 1862. Various classes of people have a monopoly granted to them by the legislature for the protection of the public, e.g., physicians, surgeons, veterinary surgeons, chemists, and others; and among them are proctors and solicitors. *Stephenson* v. *Higginson* (3) was relied on against the appellants, but it is really conclusive in their favour.

Sir *H. James* A.G. *Willis*, Q.C. and *Finlay* Q.C. for the respondents Waterlow Brothers & Layton were not heard.

EARL OF SELBORNE L.C.:—

My Lords, this action has been brought by the Law Society under certain penal clauses in two statutes. The first of those statutes is the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, which by the 2nd section says that "no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person, or in his own name," in any of the Courts "unless such person

(1) 2 B. & Ad. 708. (2) 3 D. & R. 260.
(3) 3 H. L. C. 638.

shall have been admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor." And the later Act, which is more immediately applicable to this particular Court, the Probate Court, is the 23 & 24 Vict. c. 127, the 26th section being "Every person who acts as an attorney or solicitor contrary to the enactment" in the section which I first read, viz. sect. 2 of the former Act, "or who in his own name or in the name of any other person in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate" (I omit the other words) "without being duly qualified so to act, shall be deemed guilty of a contempt of Court." There is a special penalty in that case under this particular statute—"and shall be incapable of maintaining any action or suit for any fee or reward for" what he has so done, "and in addition shall forfeit and pay for every such offence the sum of £50."

The question is whether Messrs. Waterlow have incurred these penalties by what they have done as admitted in this case. The admissions must of course be reasonably construed, but being reasonably construed it appears to me that they must be taken as conclusive in determining what the acts are which Messrs. Waterlow have done and in respect of which the question is raised. I not only think that necessary on technical grounds, but to me it is clear that looking to the parties in this case, namely, the Law Society on the one part, who in the discharge of what they consider their duty to the public and to the profession seek to have this question properly determined, and on the other hand a firm of law stationers, of whose credit and respectability no one suggests the slightest doubt, it is impossible to doubt that the facts have been fully and fairly stated so as to raise the real question which the plaintiffs on the one hand have thought it their duty to bring before the Court for its determination, and in respect of which on the other hand the defendants desire to throw no obstacle in the way of a proper determination of that question.

That being the case, we take these admissions in connection of course with the statutes from which I have just read and with the rules of the Probate Court, which, though they add nothing to the statutes, yet I think have been rightly regarded by the

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Court below as shewing that such business as may require to be transacted by a proctor, solicitor, or attorney must, if transacted in the Probate Court, be deemed to be a proctor's, or solicitor's, or attorney's business. That being the case (and so far there is no controversy between the parties) it is perfectly clear that under those rules, when the executors or parties entitled to grants of administration do not personally apply without using any agency, the application for probate or for a grant of administration must be made through a proctor, solicitor, or attorney; and inasmuch as the whole matters of business which are in question in this case are matters of business incident to the taking proper means for the necessary purposes of applications for probates and grants of administration, it is perfectly clear that they fall, so far, within the category of a proctor's or a solicitor's business. Well, that being so, the question is, who have been doing the proctor's or the solicitor's business under the circumstances which appear by these admissions; whether it has been done by the qualified persons, the proctors or solicitors, or by the unqualified persons, Messrs. Waterlow?

Now the particular acts which Messrs. Waterlow admit that they have done, and which your Lordships must take to be all the acts relied upon as raising the question, are not any of them per se such as, apart from the general business for the purposes of which they are done, would be incapable in law of being performed by unqualified persons; and therefore I take it that they are not such acts as a qualified person was incapable of doing, in law, per alium, by any person whom he employed to act on his behalf in carrying on this as part of his own business. It is conceded that the statutes in question do not as a matter of fact require proctors or solicitors to do every single matter of business of a kind which none but proctors or solicitors are qualified to do, personally or only through the agency of qualified persons, themselves proctors or solicitors. It is admitted that office messengers, office servants, office clerks, when acting for solicitors in the transaction of solicitors' business, and not in any sense practising for themselves either in their own names or collusively in the names of others, do not incur these penalties by doing business of this kind either in Court or out of

Court. In Court, before Judges, they can only do such business as the Judges permit to be transacted through such agencies; and so in the Probate Court it is quite clear that if it were thought that any particular description of person, as representing the solicitor, was a person who ought not to be permitted to represent him, there would be power to say, "We will not hear you." But the question is, whether that person has incurred a penalty; and to bring him under the penalty in a case in which it is clear that a qualified solicitor may act per alium and is not bound necessarily to act per se, it must be shewn that some law or authority has restricted the solicitor to the use of a kind of agency different from that which he has actually employed, and has made the particular agent whom he has employed subject to the penalty. No such law has been shewn, and the facts of this case, to my mind, exclude the notion of any of those things having been done from which it ought properly to be inferred that Messrs. Waterlow have been practising as solicitors or proctors for themselves. The existence of a real solicitor in every one of these cases, really applying for probate, initiating the whole matter, carrying on the whole business in his own name, although not personally going to the office, is a fundamental fact in the case; and secondly there is the fact that all the charges as between solicitor and client are made by the real solicitor, and that what Messrs. Waterlow do, by their own clerks and their own messengers, is what they are simply paid for as the agents, for that purpose, of the solicitor. What is it that they do? Why, according to these admissions they merely pass between the solicitor and the Probate Office, they are intermediate channels of communication, if I may use the expression, between them. For the purposes of their own proper business Messrs. Waterlow receive the will from their client to engross it, and they receive with it a letter of instructions telling them what to do with it when it is engrossed, and enclosing the documents upon which probate is to be granted, namely, the affidavit and the oath, which are not in the name of Messrs. Waterlow but in the name of the solicitor in the country who gives them those instructions. Those documents, namely, the engrossed will, the oath and the affidavit, together with the original will, are carried by Messrs.

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Waterlow's clerk or messenger to the Probate Office, they are left in the name of the solicitor, and a receipt is given for them. They are left, as is said in the admissions, simply in order that information may be obtained whether the documents are in order or not. If they are in order, then the clerk or messenger of Messrs. Waterlow, who calls again a day or two afterwards, receives the probate and sends it to the solicitor. If any question arises, he does not take upon himself to determine that question, or to do any solicitor's business concerning it, but the question is communicated to the person whom Messrs. Waterlow have sent—he communicates it to his employers Messrs. Waterlow, and they inform the solicitor, and then the solicitor does the proper solicitor's business arising therefrom. That is the whole matter; and the question is, Who has been practising as a proctor or solicitor?

I say that the question is one of substance and not of form. It being a case in which the true solicitor was at liberty to employ some other agency, no statute being shewn which enacts that he might not for those purposes employ this agency, there being nothing whatever in the rules which prevents the employment of such an agency, as I read them, the question is, Who has been really practising as a solicitor in this case? It is impossible to say that Messrs. Waterlow have been practising as solicitors—the whole proceedings have been in the name of the real solicitor who has employed Messrs. Waterlow. It appears to me perfectly clear that Messrs. Waterlow have not been practising as solicitors, and that they have simply executed instructions to do ministerial acts in order to save the real solicitor from the trouble and expense of doing them.

Now it is very manifest that, if Messrs. Waterlow desired to carry on the business for their own profit and used the name of some solicitor in order colourably to appear to be qualified practitioners, it would be against the statute. Of course if, without using the name of any solicitor at all, they were themselves to do the business which under the rules can only be done by a solicitor, namely to apply for probate and so on, they would be infringing the statute. But I think that they have acted bonâ fide and have done nothing illegal when we look at the substance of the trans-

action. The statutes do not strike at this particular kind of agency used by a solicitor, they strike only at practising as a solicitor or as a proctor. The Court below has thought that in this case there has been no such practising, and I believe that all your Lordships are of the same opinion.

I therefore move your Lordships that the order appealed from be affirmed and that the appeal be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. There is not supposed to be anything unfair or any fraud or any concealment in this case at all; but Messrs. Waterlow being law stationers and acting for a great many country solicitors followed a course openly which it is contended by the appellants was illegal, and the question is whether it was illegal so as to subject Messrs. Waterlow to penalties.

Now taking one instance given, namely that of Mr. Remington of Ulverstone, solicitor, who was employed to obtain probate of the will of David Atkinson deceased, Mr. Remington in doing that was acting as a proctor, and was justified in so acting because he was a solicitor; but that he was acting as a proctor in doing that is quite certain. What Messrs. Waterlow, whom he employed as law stationers, had to do with the matter appears from the admissions. He sent to them the original will to be engrossed, and with the original will he sent the documents called the affidavit and the oath—these were the matters which were requisite—and with them he sent a letter of instructions to do the acts which Messrs Waterlow did. "In accordance with such instructions," it is said, "the original will and the engrossed copy, together with the oath and affidavit, are sent by a clerk or messenger in the employ of the defendants to the principal registry office at Somerset House;" and I may say at once that I do not think it is capable of being disputed that when the clerk or messenger was sent with them to Somerset House, the defendants Messrs. Waterlow did it just as much as if they had done it with their own hands. There is no difference between what they did by the clerk or messenger and what they would have done if they themselves had gone to Somerset House

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and performed the requisite acts. Then it is said "The defendants provide the necessary stamps to discharge the fees payable at the Registry Office, the defendants being licensed dealers in stamps. The clerk in the Registry Office gives to the defendants' clerk or messenger a stamped receipt for the above-mentioned documents, which are left in the name of the solicitor and not in those of the defendants, and the receipt so states." So that Messrs. Waterlow by their clerk or messenger took the original will, the proper affidavit and the proper oath, both of which had been prepared by Mr. Remington and sent to them, and the engrossed copy for probate which in the course of their business as law stationers they had engrossed, to the Probate Office, and the Probate Office then gave a receipt shewing that these documents had been received from G. Remington of Ulverstone, Solicitor. The matter, I think, is clear up to that moment.

Now one question is, Did Messrs. Waterlow in taking these documents to the Probate Office and leaving them there for the purpose of having probate made out, act as proctors, not being qualified persons? That is the first question. I will, however, go on a little further. The admissions state what afterwards happens. "At the end of two days the clerk or messenger calls in order to be informed whether the documents are in order or whether any questions arise upon them. If the documents are in order the clerk or messenger within one or two days obtains on production of the receipt the probate from the Registry Office." Now we will suppose that Messrs. Waterlow by their clerk go at the end of the two days, and being told that the documents are all in order, produce the receipt and say, "We have come from Mr. Remington of Ulverstone, solicitor; here is your receipt for the documents which we have deposited with you—give us the probate," and we will suppose that the clerk gets the probate and goes away with it. Have they in any way within the meaning of the Act acted as proctors, either in their own name (that is not pretended) or in the name of Mr. Remington? As to acting in the name of Mr. Remington, it is to be observed that it must be taken in these admissions to be perfectly bonâ fide and true that they were acting in this way in the name of Mr. Remington, that is to say in order to get out the probate. It is also quite clear upon

the admissions which follow the words I have read, that for doing so Messrs. Waterlow make a small charge to Mr. Remington; but they have no privity of contract whatever with the ultimate executor or administrator who employs Mr. Remington, they are to be paid, not by the person who is ultimately to have the benefit of the probate being taken out, but by the solicitor, just as the clerk of that solicitor would be paid wages by that solicitor. So much is admitted. It is quite clear that Messrs. Waterlow are not like a general clerk, they are not servants of Mr. Remington in the sense that Mr. Remington has the control over them and could direct them to do what he pleased. They are contractors in the sense that they are ready to act for any solicitors, and we must take it upon the admissions that they do act for a great many solicitors who employ them in that way. In fact what they do is incident to their business as law stationers, they lend this helping hand to country solicitors who are at a distance from Somerset House.

Now the question is, Are they acting as solicitors? A solicitor taking out probate is not bound to do everything in his own person. There are some things which he cannot delegate, he is to give his personal responsibility and obligation to his client to use his own skill and his own judgment in some things which are to be done, and he ought not to delegate them at all. There are some matters as to which though he may delegate them and need not do them in person but may employ a clerk, yet he would be required to see that that clerk had competent knowledge. I do not say that he is bound by statute in the sense that the thing would be illegal if he did not select a clerk of competent knowledge, but there is the kind of obligation upon him which I have mentioned. But there are many things which a boy at 5*s.* a week could do just as well as anybody else. Now are those things which hitherto I have been dealing with, and which it is admitted that Messrs. Waterlow have done, such that the solicitor in the country should employ a skilful person to do them? There is no reason that I can see, there is no reason certainly as far as I have gone hitherto, why the solicitor in the country should not send as dull a boy as one could well select, who would be quite competent, if he was

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honest, to carry the documents for probate to the office and to bring back the receipt. I do not see the slightest ground for supposing that that is required to be done by a skilful person. It does not appear to me that Messrs. Waterlow were acting as solicitors at all, but they were doing for the solicitor something which the solicitor might and should delegate to somebody to do for him. He chose to delegate it to Messrs. Waterlow, who as collateral to their acting as law stationers were willing to do this work, receiving a small payment from the solicitor for so doing. It is, to my mind, impossible to say that they were acting as solicitors in doing it.

But then the case goes on to say, "If any question should arise as to the correctness or sufficiency of the documents such question is communicated to the clerk or messenger and by him to the defendants, who inform the solicitor, from whom they received the documents, thereof. When a satisfactory reply is given there is the same procedure as before." Now I certainly construe that to be that when there are difficulties, when the answer is that the documents are not in order, the messenger has to carry back to Messrs. Waterlow and through Messrs. Waterlow to the solicitor in the country, to Mr. Remington of Ulverstone, the statement, "The documents are not in order for such and such a reason," and that Mr. Remington of Ulverston then rectifies them in such way as the case may require. If the clerk or messenger of Messrs. Waterlow merely receives such objection and transmits the message of such objection being made, I do not see that it carries one further. But it was contended that it might be that a great deal more was done,—that it might be that when the objection was one of a nature that could be obviated (as it might perhaps be) by argument at once, this messenger of Messrs. Waterlow was to argue it and to advise upon it, and to discuss it, and to do various things which certainly I think Mr. Remington would not be doing quite his duty to his clients if he delegated to another person to do for him, and as to which certainly, if Messrs. Waterlow did them (I think it is probable that they were too wise), if they incurred all the responsibility of advising on matters of law and things of that sort, they would be doing a very foolish and rash thing. If they did all this it would be a

plausible argument to say that in doing things like that, furnishing intelligence and legal advice and so on, which Mr. Remington ought not to have delegated to them to do, they were acting as solicitors. Sir Hardinge Giffard requested that we would not decide anything beyond what was in the case before us; and I do not say that this would be a thing which would make them liable to the penalty for acting as proctors if they were to do it, but I will go as far as to say that I do not believe they ever did it, and I am sure they will be wise not to do it in future if they have done it before. But I do say that we cannot upon these admissions hold that they are liable to pay a penalty of £50 on the supposition that they may perhaps have done something or other which certainly the admissions do not state that they did.

I quite agree that if Messrs. Waterlow did this work upon payment from the ultimate client direct, if they were receiving a portion of the profits as partners, if they were in any way, by fraud or otherwise, acting in the name of Mr. Remington but really and truly for themselves, they would be within the enactment. On these admissions it is clear that they were doing nothing of the sort. When I look at the judgment of the Court below which is proposed to be affirmed, I see that it goes upon the ground that Messrs. Waterlow were honestly and really doing for Mr. Remington and in Mr. Remington's name a thing which Mr. Remington might delegate to them or to anybody else to do for him, it requiring no peculiar skill, and it not being at all requisite that it should be done by a servant of Mr. Remington if it was done by a person who did not in any other way act as a proctor.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion. I have no doubt that the matter of soliciting probate, such as a non-contentious probate even, is a matter within the Act of Parliament; and the question is, as Brett L.J. said, whether Messrs. Waterlow have acted as proctors in respect of these proceedings. Now I am of opinion that they have not, and I am of opinion that they have not because they have not; and really that is the only answer which one can give to the case made against them.

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People frequently embarrass and puzzle themselves in seeking for a reason for a negative opinion, and none can be given except that the thing has not been made out on the other side. In my opinion it has not been shewn that Messrs. Waterlow acted as proctors in this case. If the only evidence against them had been that they had engrossed the probate, I really do not see, supposing that that had been the case, what answer one could give except that they had not acted as proctors; nor do I see what other answer can be given in this case except that they have not acted as proctors.

Now the proctor or solicitor in the matter is the country solicitor, a duly qualified man. The defendants act for him. They have no communication with the real client—they have no pretence of skill, that is to say in advising the proceedings in any way, and they would not be liable for the want of it to the real client. All that they do is something for the duly qualified man. Well, is that an acting as proctors? I say, no. It is quite certain that the duly qualified man is not limited to acting in his own proper person. A solicitor is not bound to go to the writ office to get his writ sealed, nor to go to the probate office to get the probate of a will. It is admitted that he may do it by a clerk; and I should think it would be equally admitted that he may do it by a friend or possibly by a friend's clerk; and I cannot help thinking that the real question in this case is that which has been put by Cotton L.J., that the question, if anything, is for the Court of Probate. I suppose that the Court of Probate might say (there is nothing to prevent their doing it that I know of, and if it was a discreet and proper thing to do they would no doubt be upheld in it): "We will not allow you, the country solicitors, to send anybody except your London agent or your own clerk or your London agent's clerk, we will limit your dealings to such persons as those, and we will not allow Messrs. Waterlow, or a commissionaire if he comes, to leave the papers or to apply for the probate in return." That might be; but they do allow it at present, and what is done by Messrs. Waterlow is not to act as proctors but to do something for a proctor; and I cannot help thinking that if we were to hold otherwise, this consequence might follow. If a solicitor

were to permit a man to use his name to make some application to the Court, but which application was made in reality on his own account and not on the account of the solicitor whose name was used, that would be a contempt of Court; and the consequence of our holding that Messrs. Waterlow were so acting would be that every one of these gentlemen who have employed Messrs. Waterlow would be subject to proceedings for contempt.

I am clearly of opinion that there is no ground for this action.

LORD FITZGERALD:—

My Lords, I adopt the construction put by the Court of Appeal upon the admissions in the case, and which has been adopted by the Lord Chancellor, and I concur in his judgment and in the reasons which he has given for that judgment. I have come to the conclusion that Messrs. Waterlow have not been guilty of the offence (for it is an offence that is dealt with by the Act of Parliament, it is so described) which is imputed to them.

Sir H. Giffard Q.C. for the appellants in the second appeal (Skinner respondent) admitted that the two cases must stand or fall together, and that he had nothing to add in the second appeal, in which the only difference was that the law stationer had acted for London solicitors.

E. Clarke Q.C. and *Bremner* for the respondent Skinner were not heard.

Orders appealed from in each appeal affirmed, and appeals dismissed with costs.

Lords' Journals 1st May 1883.

Solicitors for appellants: *C. O. Humphreys & Son.*

Solicitors for respondents Waterlow Brothers & Layton: *Layton, Son, & Lendon.*

Solicitors for respondent Skinner: *Ashurst, Morris, Crisp, & Co.*

[HOUSE OF LORDS.]

H. L. (I.) 1883 May 9.

THE HON. ELIZA NETTERVILLE CAHILL, Widow . . . . . } Appellant;

AND

MICHAEL HUSSEY CAHILL, and Others Respondents.

Husband and Wife, Contract between—Wife's Conveyance—Fines and Recoveries, Act for abolition of (Ireland) (4 & 5 *Will.* 4 *c.* 92) *ss.* 68, 71.

A married woman was entitled by an ante-nuptial settlement to a jointure rent-charge after her husband's death secured upon his real estates in Ireland. The wife having left him the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification and no further steps were taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—

Held, reversing the decision of the Court of Appeal in Ireland, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4 c. 92 ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her.

Hunt v. *Hunt* (4 D. F. & J. 221; 31 L. J. (Ch.) 161) and *Besant* v. *Wood* (12 Ch. D. 605) commented on by the Earl of Selborne L.C.

Appeal from an order of the Court of Appeal in Ireland (1), affirming a judgment of the Vice-Chancellor of Ireland (2).

The facts are set out in the reports of the decisions below and in the judgment of the Lord Chancellor in this House.

April 12, 13, 16. *Davey* Q.C. and *Jason Smith* for the appellant:—

The questions of law are whether a married woman entitled to jointure after her husband's death out of his real estate can charge it by a written agreement, not acknowledged in accordance

(1) *Cahill* v. *Martin*, Ir. L. Rep. 7 Ch. 361. (2) Ir. L. Rep. 5 Ch. 227.

(1) SC 8 Jur N S 885

with the Act for the Abolition of Fines and Recoveries (Ireland) (4 & 5 Will. 4 c. 92), and whether the Court can decree specific performance under the present circumstances. As to third persons a wife even with her husband's concurrence could not contract as to her real estate without the statutory forms, though she were at arm's length with her husband. Neither could she so contract with her husband. Even a deed would not bind her unless acknowledged. If this alleged agreement be anything it is a release in equity; no case exists of a wife being decreed to execute and acknowledge a deed, for the examiner must be satisfied that it is her free voluntary act. The statute 4 & 5 Will. 4 c. 92 by ss. 68, 71, requires a deed of release of lands or money charged on lands to be acknowledged and the wife examined. The cases relied on by the Irish Court of Appeal, *Bateman* v. *Countess of Ross* (1); *Wilson* v. *Wilson* (2); *Vansittart* v. *Vansittart* (3), were all suits by a wife and do not support the decision. Nor does *Besant* v. *Wood* (4). A wife's capacity to contract is confined to property as to which she is to be considered a feme sole and to the purposes for which she is to be so considered: *Vansittart* v. *Vansittart* (5).

[EARL OF SELBORNE L.C.:—*Hunt* v. *Hunt* (6) is the only case in which an injunction has been granted at the suit of a wife to restrain a husband from carrying on his suit for restitution of conjugal rights, the husband having covenanted not to endeavour to compel the wife to cohabit with him by any legal proceedings. An appeal to this House from that decision was fully argued; and everything which fell from the Law Lords (except Lord Westbury), in an unusually strong House, was favourable to the appellant; as I myself know, from having argued the case. But Lord Westbury persuaded the House to put some question to the Judges, and meanwhile the husband died, so that the case came to an end. Sir G. Jessel seems to have followed that authority in *Besant* v. *Wood* (4).]

A wife cannot bind her interest in realty not settled to her separate use, except by an acknowledged deed, either at law or in

(1) 1 Dow. 235.
(2) 1 H. L. C. 538.
(3) 4 K. & J. 62.
(4) 12 Ch. D. 605, 622, 623.
(5) 4 K. & J. 62, 70.
(6) 4 D. F. & J. 221; 31 L. J. (Ch.) 161.

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equity: *Jordan* v. *Jones* (1); nor can she elect to release her jointure even though she has obtained a benefit: *Frank* v. *Frank* (2); see also *Lassence* v. *Tierney* (3); *Field* v. *Moore* (4); *Crofts* v. *Middleton* (5); *Nicholl* v. *Jones* (6); *Castle* v. *Wilkinson* (7); *Avery* v. *Griffin* (8). *Savage* v. *Foster* (9) is the only case where the Court decreed a wife to levy a fine; even that is not the same as acknowledging a deed; that was a case of fraud, and is of questionable authority. The Irish Court of Appeal founded their judgment on *Barrow* v. *Barrow* (10); but that was not a case of a judicial compromise, but of a decree obtained at the wife's own instance. *Robinson* v. *Wheelwright* (11), *Ardesoife* v. *Bennet* (12), and the other cases relied on by the Court shew that a wife is bound by the doctrine of election like anybody else and nothing more. This is not a case of election. *Willoughby* v. *Middleton* (13) was commented on by Jessel M.R. in *Smith* v. *Lucas* (14). The wife never could have had specific performance because she could not have released her pin-money; and therefore the husband could not.

April 16, 17. *Samuel Walker*, Q.C. of the Irish Bar and *Romer* Q.C. (*Greig* with them) for the respondents:—

1. The contract though perhaps not such as would have been enforced in equity (in consequence of the wife's qualification), immediately after its execution, was acted upon by the parties so as to give a right to specific performance. The husband did all he could to carry it out, and this and the delay amounted to part performance. A parol acceptance of a written and signed offer is if communicated sufficient to make a contract and to bind the party signing and to entitle to specific performance: Fry's Spec. Perf. 2nd ed. p. 130; *Warner* v. *Willington* (15); *Smith* v. *Neale* (16); *Reuss* v. *Picksley* (17).

(1) 2 Ph. 170.
(2) 3 My. & Cr. 171.
(3) 1 Mac. & G. 551.
(4) 7 D. M. & G. 691, 717.
(5) 2 K. & J. 194; 8 D. M. & G. 192.
(6) Law Rep. 3 Eq. 696.
(7) Law Rep. 5 Ch. 534.
(8) Law Rep. 6 Eq. 606.
(9) 9 Mod. 35.
(10) 4 K. & J. 409, 418.
(11) 6 D. M. & G. 535.
(12) 2 Dick. 463.
(13) 2 J. & H. 344.
(14) 18 Ch. D. 531, 545.
(15) 3 Drew. 523.
(16) 2 C. B. (N.S.) 67.
(17) Law Rep. 1 Ex. 342.

2. Assuming a contract it bound the wife though not acknowledged, and though there is no case where equity has compelled a wife to execute a deed according to the Act for the Abolition of Fines and Recoveries, it bound her estate, and the statute is got rid of by virtue of the pendency of the matrimonial suit; e.g. where the doctrine of election arises: *Wilder* v. *Pigott* (1); or where there is fraud; *Sharpe* v. *Foy* (2); *In re Lush's Trusts* (3); *Stanley* v. *Stanley* (4); *Nicholl* v. *Jones* (5). In none of the cases relied on contra was there as here a compromise of a pending suit. There is no decision against the respondents, and apart from authority husband and wife were in a position to contract as to a settlement of the action, and her separate estate, because she was in fact free from marital control. It may be that equity enforces such a contract only where a question of separation arises, but the point has not been decided. The jointure was the consideration for the marriage, and was therefore intimately affected by the separation. Statute 4 & 5 Will. 4 c. 92 was an enabling, not a prohibitive Act, and before that Act equity would have bound the estate: *Gretton* v. *Haward* (6). The husband being dead there is now no difficulty in decreeing the widow, as a feme sole, to execute.

Jason Smith replied.

[The arguments pro and con., as to whether a final agreement had ever in fact been come to, are omitted as irrelevant.]

The House took time for consideration.

May 9. EARL OF SELBORNE L.C.:—

My Lords, the appellant, Mrs. Cahill, was married to her late husband in February 1876. Under the ante-nuptial settlement then made she was entitled to an annual sum of £100 pin-money for her separate use during the marriage, without power of anticipation, and to a jointure rent-charge of £550 after her husband's death, secured to the trustees of the settlement, and charged upon certain real estates of the husband.

(1) 22 Ch. D. 263.
(2) Law Rep. 4 Ch. 35.
(3) Law Rep. 4 Ch. 591, 601.
(4) 7 Ch. D. 589.
(5) Law Rep. 3 Eq. 696, 708.
(6) 1 Sw. 409, 413, n, 425, n, 433, n.

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In the course of the same year disagreements arose, in consequence of which the appellant left her husband's house; and in February 1877 Mr. Cahill commenced a suit against her in the Matrimonial Court for restitution of conjugal rights; and he also brought actions against her mother and another person for harbouring her. Negociations followed, with a view to the compromise of these suits by an agreement for separation, and a document was reduced into writing on the 20th of April 1877, which a majority of the judges in the Court of Appeal in Ireland (affirming a judgment of the Vice-Chancellor) have held to be a concluded agreement. By that document (not acknowledged according to the Act for the Abolition of Fines and Recoveries) it was stipulated that the appellant should release her pin-money, and £200 per annum, part of her jointure rent-charge. Her husband died on the 3rd of October following; nothing having been done in the interval beyond the preparation and settlement (with the concurrence of the friends and legal advisers of both parties) of the draft of a deed to give effect to the terms of the alleged agreement, and some ineffectual attempts to induce the appellant to execute it. The suit for the restitution of conjugal rights did not in the meantime proceed; it was not however dismissed or formally stayed.

In November 1878 the appellant instituted proceedings in the Chancery Division of the High Court of Justice in Ireland to have the trusts of her marriage settlement executed, upon the footing of her being still entitled to the arrears of her pin-money and to the full jointure of £550 per annum. The alleged agreement was pleaded by way of defence and counter-claim; and effect was given to it by the judgments now under appeal (from which Lord Justice Fitzgibbon dissented) so as to reduce the appellant's jointure to £350 per annum. As to the pin-money the agreement was held to be ineffectual.

The grounds on which the majority of the Judges in the Court of Appeal proceeded (as stated by Lord O'Hagan, then Lord Chancellor) were these. First, "that in the peculiar circumstances in which she placed herself, the plaintiff, though a married woman, had capacity to enter into a contract with her husband, and to be dealt with, quoad that contract, as if she had

been a feme sole"; and secondly, "that in fact she did enter into such a contract, which was absolute and unconditional, and ought to bind her in conscience and in law." The Lord Chancellor also considered it to be settled, by decided cases, "that the wife's disability to contract with her husband ceases when she is in such relations of antagonism towards him, and separation from him, and independence of him, as negative the general presumption of submission to his control, which in the absence of prescribed safeguards nullifies her acts because they are supposed to be wanting in spontaneity and freedom"; holding that in this case those conditions were fulfilled; "there was separation, there was antagonism, there was independence."

After considering the reasons assigned for these judgments, and the arguments urged at your Lordships' bar, I am unable to concur in the view, either of the law or of the facts, which prevailed with the Vice-Chancellor and in the Court of Appeal; and as the general question of law is of greater importance than the particular circumstances of this case, I think it necessary fully to explain my view of it. That question is whether the agreement (supposing it to have been made as assumed by the Courts below) would bind the appellant as to her jointure rent-charge, so as to be capable of being enforced against her after her husband's death? If not the judgments appealed from are erroneous.

The common law of this country, as to the disabilities of married women, was not (as I conceive) founded on any presumption against the spontaneity or freedom of acts done by the wife when under marital control; nor was it subject to exception whenever there might be circumstances sufficient to repel such a presumption. The principle of the disability of coverture was that stated by Littleton (sect. 168): "A man and his wife are but one person in the law," which is the reason why "a man cannot grant or give his tenements to his wife during the coverture"; and (as Lord Coke says, in his comment on the same place) "she is disabled to contract with any, without the consent of her husband; omnia quæ sunt uxoris sunt ipsius viri." As to her personal property in possession the husband had absolute power without any concurrence on her part, and also as to the administration

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and usufruct of her real estate. By personal contracts either with him, or with any other person, she could in no way bind herself. Equity, in later times, through the medium of trusts, enabled her to acquire separate estate, and to deal with such separate estate as if she had been a feme sole, except when restrained from anticipation by the terms of the trust; in which case she continued under disability as to the corpus and future income of such property, though the jus mariti was excluded; and, by a statute recently passed this doctrine of separate estate has been very largely extended.

Although a married woman could not contract or convey property (not separate) except so far as by common or statute law she was enabled to join with her husband in doing so, she might always, when her interest required it, sue and be sued, jointly with her husband, or (in equity) apart from her husband by a next friend. In respect of all interests which she had in the subject-matter of any such suit, she was bound as much as if she had been under no disability, by the powers of the Courts, and by the rules and principles of law and equity administered by them. Real estate of which she or her husband in her right might be in possession could be recovered against her as well as against her husband. Her conscience, as well as that of her husband, might be affected by personal frauds, so as to enable the Courts to adjudge what otherwise would have been hers to the defrauded party. If property were given to her on an express or implied condition, she might accept and sue for it, but she could not, any more than a person under no disability, at once accept the gift and reject the condition. Unless she had been held under such circumstances to be capable of election the gift must necessarily have failed; which Courts of Equity thought neither necessary nor reasonable. It was, therefore, a just corollary from her right to sue, and her liability to be sued, in such a case, that she might elect, and be bound by her election, unless the nature of her interest in any property to be relinquished created some obstacle. Courts of Equity did not, in such cases, proceed upon the principle of ascribing to a married woman capacity to bind herself or her property (not separate) by contract, for this special purpose; she could not so bind any separate

estate as to which she was at the time restrained from anticipation. The late Master of the Rolls, in *Smith* v. *Lucas* (1), also held that she could not, by any election, bind beforehand her after-acquired separate estate (though given to her without restraint on anticipation), which she certainly might have done if she had been supposed to have for that purpose the same capacity to contract which she would have had if a feme sole. In *Stanley* v. *Stanley* (2) the Court of Chancery refused to hold a married woman estopped even by her own participation in a gross fraud, by which an innocent purchaser was led to believe that she was not restrained from anticipation, when she was, in fact, so restrained.

Another consequence of the locus standi in curiâ of a married woman for the purpose of asserting or defending her rights of property (whether with her husband or by a next friend), and of having the rights of others asserted against her, was that her interests in the subject-matter of the litigation to which she was so made a party might be bound by way of transaction or compromise; and this has been in modern times extended to compromises out of as well as in Court. It was on this foundation that the forms of judicial assurance, by which freehold estates of married women were alienated at common law, down to the passing of the Act for the Abolition of Fines and Recoveries, originally rested. The "fine," or "concordia," which was necessary for that purpose, is defined by Bracton as identical in principle with the transactio litis of the Roman Civil Law. It was levied in a real action, supposed to be brought for the recovery of the particular lands which it was to bind; it was considered "as exactly similar, and attended with the same consequences as a judgment in an adverse suit." Livery of seisin was unnecessary, "because lands acquired in this manner were supposed to be recovered by sentence of a Court of justice, and the possession was delivered by the sheriff, in pursuance of a writ directed to him for that purpose." And because the cognizance was thus in the nature of a judgment, it bound only those persons and things which were named in the writ, and were judicially before the Court (Cruise, Digest tit. 35, "Fine," ch. 1, sects. 8, 12, and ch. 2, sect. 42). "As

(1) 18 Ch. D. 531. (2) 7 Ch. D. 589.

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married women might always be impleaded jointly with their husbands, it followed that they could join with their husbands in levying fines" (Ibid. ch. 5, sect. 5).

There is no case in the books, before the Acts for the Abolition of Fines and Recoveries, in which a married woman was held bound, on the footing of contract (without fine), to alienate her freehold lands or hereditaments not settled to her separate use. And the means of alienating such lands, substituted by those Acts for fine, although no longer founded on the fiction of judicial transaction or compromise, can only be made available by following the procedure which those Acts prescribe. Sect. 68 of the Irish Act, 4 & 5 Will. 4, c. 92, while enabling every married woman to dispose of her lands, &c., by deed, "as fully and effectually as she could do if she were a feme sole," is guarded by this "saving and exception," "that no such disposition, &c., shall be valid and effectual unless the husband concur in the deed by which the same shall be effected" (a condition which is dispensed with in certain cases by sect. 81), "nor unless the deed be acknowledged by her as hereinafter directed." The acknowledgment is regulated by subsequent clauses, of which sect. 71 provides that the married woman shall not be permitted to acknowledge the deed unless, being examined apart from her husband, "she freely and voluntarily consents to such deed." If she does not so consent "such deed shall, so far as relates to the execution thereof by such married woman, be void." A married woman has, therefore, now by law no power of control or alienation over or with respect to her real estate (not separate), except such as is given to her by statute; and the power thereby given to her is conditional on its execution in the manner which the statute prescribes. In the case before your Lordships that power has not been exercised, because the statutory conditions have not been complied with; and when that is the case, there is no contract of which, according to the established rules and principles of equity, specific performance can be decreed: *Castle* v. *Wilkinson* (1); *Avery* v. *Griffin* (2).

It has, nevertheless, been argued in this case, that if a stipulation that a married woman shall release or convey her freehold

(1) Law Rep. 5 Ch. 534.

(2) Law Rep. 6 Eq. 606.

interest in real estate to her husband is one of the terms of an agreement for the compromise of a matrimonial suit, such stipulation is binding upon the wife, and upon her real estate (not settled to her separate use), although neither the contract itself, nor any deed founded upon it, has been acknowledged according to the statute. There was never any decision to that effect before that now under appeal; but the principle of the argument was considered in the Court below to receive support from certain authorities, to which I shall presently refer.

Before doing this it may, perhaps, be well to consider how the point would appear to stand in reason if there were no authority. To the general incapacity of husband or wife to sue, or to be sued by, each other, matrimonial suits between them for a divorce à mensâ et thoro, for a dissolution or nullity of marriage, or for restitution of conjugal rights, were (of course) necessary exceptions; and some power to terminate such suits by way of compromise would appear, on sound principles, to have been reasonably incident to the power to institute and to defend them. But the reason founded upon the necessity of such a case goes no further than this, that the parties ought to be capable of coming to an agreement with each other concerning the subject-matter of the suit, so as to make its further prosecution (possibly, also, the institution at a future time of other similar proceedings) unnecessary; and that, if they do so, that agreement must be a good consideration for any other stipulations concerning property which either of them, acting within the limits of his or her general legal competency, may, as part of the same arrangement, make in favour of the other. A husband may contract by a deed or articles of separation to pay an annuity, or to convey property real or personal for the benefit of his wife; and a wife may contract to release or transfer, for the benefit of her husband, real or personal estate settled to her separate use when there is no restraint on anticipation. These are not matters within the scope of the litigation; but as the husband has full power to contract concerning his own property, and as the wife has full power to contract concerning her separate estate with any stranger, so may they, in consideration of an agreement to compromise a

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matrimonial suit, contract concerning the same matters inter se. It would be otherwise (as has been determined in this very case) if it were a term of such an agreement that the wife should release or transfer to the husband property settled to her separate use, over which she had no power of anticipation; or if not possessing at the time any separate estate which she could anticipate, she were personally to agree to pay an annuity to her husband—contracts into which she would be unable to enter with any other person. Why should not the same reasons also apply to a contract, on such an occasion, concerning her freehold estate (not separate)? Why should she be bound by such a contract in an arrangement of this kind with her husband, when, if made with a third party for valuable consideration, that contract would be void?

The authorities when examined do not contradict (on the contrary some of them appear to me to confirm and illustrate) this view of the law. I will mention those on which the counsel for the respondents mainly relied.

Bateman v. *Countess of Ross* (1), *Wilson* v. *Wilson* (2), *Vansittart* v. *Vansittart* (3) and *Besant* v. *Wood* (4) were all cases of agreements for separation; all, except the last, founded on compromise of suits, and the last was treated by the late Master of the Rolls as virtually for the prevention of a suit, which (whether rightly or not) he regarded as the same thing. In the first of those cases the agreement was embodied in an award, made a rule of the Court of Chancery in Ireland, and afterwards in a deed which the husband executed; in the last it was embodied in a deed containing mutual covenants between the husband and trustees for the wife. In *Wilson* v. *Wilson* (2) and *Vansittart* v. *Vansittart* (3) the agreement rested on articles, for specific performance of which the wife sued. In all those cases except *Besant* v. *Wood* (4) the relief was sought by the wife against the husband who (if there was sufficient consideration for the agreement) had certainly bound himself.

In *Bateman* v. *Ross* (1) there could be no possible question as

(1) 1 Dow. 235.
(2) 1 H. L. C. 538.
(3) 4 K. & J. 62.
(4) 12 Ch. D. 605.

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to the sufficiency of the consideration, if the husband and wife were held capable of contracting together, for the settlement of their litigation; for the wife gave up to the husband, as part of the arrangement, nine tenths of an annuity of £500, settled to her separate use without restraint on anticipation, nor could there be any question that both parties were completely bound, unless provisions for their living apart were contrary to the policy of the law. The agreement of compromise had been judicially confirmed, and it contained no term with respect to any real or other property of the wife which she could not equally have bound by any contract with a stranger to the litigation. In *Wilson* v. *Wilson* (1) there was no stipulation for the alienation or relinquishment of any property or income of the wife to the enjoyment of which she would otherwise have been entitled.

In *Besant* v. *Wood* (2) there was no stipulation of any kind as to the wife's property. All that was determined in either of the two latter cases, which it can be material now to consider, was, that agreements for separation founded on the compromise of matrimonial suits and differences were not contrary to the policy of the law; that the compromise of such suits was a sufficient consideration for such agreements between husband and wife; and that, so far, at all events, as might be necessary to enable such compromises to be made, the wife was to be regarded as placed, towards her husband, in the position of a feme sole. The late Master of the Rolls cannot have intended by the language which he used in *Besant* v. *Wood* (2) to affirm the doctrine that the wife was to be regarded as a feme sole in such an absolute sense as to give her an unqualified power to contract with her husband, on the occasion of such a compromise, concerning her real or personal estate, in a manner in which she could not contract for any consideration with any other person.

The necessary limitations of her capacity so to contract were recognised by Vice-Chancellor Wood in *Vansittart* v. *Vansittart* (3); where that learned judge said, that a wife, suing for a divorce from her husband, was to be considered as a feme sole "*capable of contracting with her husband for the abandonment of*

(1) 1 H. L. C. 538. (2) 12 Ch. D. 605.
(3) 4 K. & J. 62, 71.

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her suit against him, upon any terms for which she may think fit to stipulate; but subject of course to this limitation, that her capacity to contract is confined to the matters as to which she is to be considered a feme sole, and to the purposes for which she is so considered." In that case, specific performance of the articles was refused, because they contained stipulations as to the children of the marriage, which (in the then state of the law) were contrary to public policy; and when explaining the sort of contract which, in his opinion, might have been specifically performed, the Vice-Chancellor was careful to confine his observations to "the simple case of an agreement between husband and wife, by which, in consideration of the wife abandoning her suit, the husband agreed to pay her an additional annuity."

Besides these authorities, another was relied upon, *Barrow* v. *Barrow* (1) which was not a case of a separation agreement. The plaintiff Mrs. Barrow, was an infant when she married, and was then entitled (apparently as tenant in tail) to a copyhold estate (like the wife in *Ardesoife* v. *Bennet* (2)); and the husband, by marriage articles, covenanted with trustees that this estate of the wife should be surrendered on trust for the wife for life, for her separate use during the coverture without power of anticipation, with remainders to himself and the children of the marriage. There were several children; and the wife, when of full age, sued the husband for specific performance of those articles, and obtained a decree in his lifetime for that purpose. Not long afterwards he died, and she then endeavoured to repudiate her own suit and decree; but the Court held that when she instituted the suit she elected (as it was competent for her to do) to take under the articles, and that she was bound by the decree. Whatever bearing that case may have on the doctrine of res judicata, or on that of election (as to married women), it has in my opinion none upon the question now before your Lordships. There is no question here of res judicata; none, in my judgment, of election.

In the only remaining case which I think it necessary to mention, *Williams* v. *Baily* (3), Vice-Chancellor Wood did no

(1) 4 K. & J. 409. (2) 2 Dick. 463.
(3) Law Rep. 2 Eq. 731.

more than refer to the previous authorities, and say that he should have had no hesitation in holding the wife bound to the separation deed which had been in that case executed, and to all its provisions (none of which related to any property of the wife), "if she had sought to enforce it against her husband, or unequivocally asserted her rights under it," which she had not done. That case adds nothing to the other authorities.

My opinion being, for the reasons which I have stated, in favour of the appellant upon the question of law, even if she had assented in the most unqualified manner, by writing under her hand, to the terms of separation which were proposed to her on the 20th of April 1877, it is not necessary for me to say much upon the question of fact, whether she did or did not so assent. What she did was to affix her signature to a memorandum appended by her to the proposals (a duplicate of which her husband had signed), agreeing to them "*except* that which relates to defamatory letters, and the fee lands being released from the £200 a year," and adding as to the letters, her reasons for objecting, and as to the other matter, these words, "The leasehold lands, so far as their value goes, must be included in the £200 a year I am to release." I will not attempt to determine whether this memorandum, so far as it related to the release of the £200 a year, was or was not founded upon a misunderstanding, or whether she confounded "the fee lands" with the "leasehold lands," or whether any consistent or reasonable construction at all can be placed upon the words which she used. It is enough to say that those words do not appear to me to be susceptible of any construction which would make them such an acceptance of the terms proposed to this lady as would have been necessary for specific performance if she had been under no disability. After such a signature, so qualified, the matter rested, in my opinion (as it had done before), in negotiation merely, and I think it so continued to the end.

It is clear that the appellant's friends when they proceeded to settle the draft of the intended deed altogether disregarded her memorandum, except as to the "defamatory letters"; perhaps because they thought it nonsense, perhaps because they thought her perverse and unreasonable. But I can see no evidence that

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she ever did, even by parol, positively agree to release any part of her jointure. The whole character of her letters (on which severe observations were not unjustly made) appears to me to shew that she was willing to have recourse even to artifice and evasion rather than bind herself absolutely by any agreement. The suspense of the husband's suit in the Matrimonial Court pending the negotiations, and his premature death (doubtless not anticipated when the negotiation began, though perhaps regarded as probable for some time before it actually happened), do not appear to me to make any difference in the case.

My conclusion is, that the judgment under appeal ought to be reversed, and that the case should be remitted to the Court below, with a declaration that the appellant is entitled to judgment for the execution of the trusts of the settlement of the 1st of February 1876, and an account, in conformity with her statement of claim, and also to her costs of suit; and that the counterclaim of the respondents, M. H. Cahill and J. H. Cahill, should be dismissed with costs; and that the appellant should have her costs of the appeal to the Court of Appeal in Ireland. The costs of this appeal will follow the event.

LORD BLACKBURN:—

My Lords, I have had the advantage of perusing in print the opinion of the Lord Chancellor. I quite agree with him in thinking that there is no sufficient ground proved to enable a Court of Equity to enforce against Mrs. Cahill, now that she is a widow, a contract (assuming such to be proved) made by her when a feme covert to part with an interest in lands, that contract not being one which was acknowledged so as to comply with the conditions of 4 & 5 Wm. 4 c. 92.

This is the only point which I think it necessary to decide, but in giving my reasons for coming to that conclusion, I must express my opinion on some questions not perhaps necessarily involved in the decision, and, to adopt the language of the late Master of the Rolls in *Besant* v. *Wood* (1), I say advisedly my opinion, because I am free to confess that the law is not so clearly settled on them as to enable me to say what is the law. If the

(1) 12 Ch. D. 620.

questions were so involved in the present case that it was necessary to decide them, your Lordships' decision would in future declare the law. As it is I express an opinion only.

[Having stated the pleadings and the facts which are set out in the reports below (1) his Lordship proceeded.]

I think therefore that there was no memorandum signed by or on behalf of Mrs. Cahill sufficient to satisfy the Statute of Frauds. I do not think, however, that that is the defence raised and it is not on this that I base my judgment.

I think there is evidence which convinces me that Mrs. Cahill had, as far as it was competent for her (being a married woman, and dealing with her husband) so to do, agreed to convey this interest, but she had not acknowledged that agreement. If she had, during her husband's life, like the defendant in *Avery* v. *Griffin* (2), boldly said "I have made a bad bargain, and as I have never signed any acknowledged instrument, I am not bound, and I will repudiate it," the only question would have been whether the circumstance that this was an agreement come to with her husband in the course of a negotiation for a compromise of a suit against her, which she defended, made a valid distinction between her case and that just cited. She was not so frank. I am sorry to use the word with reference to the conduct of a lady, but she shuffled, and certainly gave colour at least for the allegation that she thought her husband bound, so long as she did not expressly repudiate the agreement, and meant to keep the matter open, in the expectation that his death, before she either signed the deed, or refused to do so, would leave her free; whether this was so far done as to amount to a fraud is a question which I shall deal with afterwards.

In the meantime I will consider the question whether the case of *Avery* v. *Griffin* (2) is distinguishable, on the ground that this was not a contract made by the wife with a stranger to sell the land for money but a contract made by the wife with her husband to part with the interest in land, in consideration of his agreeing to compromise a suit for the restitution of conjugal rights, and consent to a separation.

I think I must express an opinion (though, adopting the

(1) Ir. L. Rep. 5 Ch. 227; 7 Ch. 361.

(2) Law Rep. 6 Eq. 606.

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distinction which the late Master of the Rolls took in *Besant* v. *Wood* (1), I do not decide it), that a wife being competent by the laws of this country to defend an action in the Matrimonial Court must be competent also to compromise it in any way which it would be lawful for a feme sole to compromise a suit against her. And I think that if a feme sole promised verbally for any sufficient consideration to do anything lawful she would be liable at common law to an action for damages for not doing so. And I think, as is laid down in Comyns' Digest (Action upon the case upon Assumpsit B) that "the consideration on which an assumpsit shall be founded must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiff. And, therefore, a promise in consideration of the forbearance of a suit is good; for that is for the benefit of the defendant though the action is not discharged; for forbearance for a reasonable time is sufficient." And if the promise was for this consideration to convey land—at common law, and if there is a sufficient memorandum to satisfy the Statute of Frauds, still—the feme sole would be liable to an action for damages, and, in a proper case, might be compelled, in equity, to specifically perform the promise.

No action could possibly be brought for damages by the husband against the wife; but I do not at present see any reason why she might not be compelled specifically to perform her promise, if the circumstances under which it was made were such as to make it binding on her conscience within the rules of equity, and there was no statute to prevent its being so.

And again, only expressing an opinion, I think that a woman whether a feme covert or a feme sole, may be guilty of a fraud. She cannot be criminally punished for the fraud if she committed it under the coercion of her husband. In *In re Lush's Trusts* (2) a married woman in concert with her husband was, for the purpose of deceiving a mortgagee, guilty of what was not only a fraud, but a forgery (*Reg.* v. *Ritson* (3)) and afterwards sought to recover the fund. Lord Romilly thought "she was under the influence of her husband, and had not the moral

(1) 12 Ch. D. 605.

(2) Law Rep. 4 Ch. 591, 595 n.

(3) Law Rep. 1 C. C. R. 200.

power to resist an influence which the law recognises, and her yielding to which the Court is bound to excuse." This decision was reversed. In fact she was an active party to the fraud, which is the ground on which Lord Justice Giffard puts it, but besides, as Lord Justice Selwyn points out, she carried on the fraud after her husband was in prison and she could not have set up coercion by him as a defence to a criminal indictment for, when in fact they were apart, uttering a document knowing it to be forged.

In *Stanley* v. *Stanley* (1) Vice-Chancellor Malins says, "This is a case in which I can entertain no doubt. I consider that the fraud was fraud both of the husband and wife, for the circumstances shew that she knew what her husband intended to do and did. But, notwithstanding this, I am bound to hold that in no case, and by no device whatever, can the restraint upon anticipation be evaded." Notwithstanding these opinions of Lord Romilly and Vice-Chancellor Malins I should not like it to be supposed that I think a married woman may not by her fraud be bound in conscience, and be therefore compelled in equity, to fulfil a contract, though, as a contract, it was not binding on her.

But I am quite unable to see any principle on which it is to be said that, to refuse to fulfil a contract which, by the express provision of a statute, a married woman is not bound to fulfil, can be considered a fraud on her part. It may not be such an act as a scrupulous lady would like to do, and I think in many circumstances I should say it was not honourable on such a ground to repudiate an agreement really come to, but I can see no principle on which it is to be considered as a fraud. And the decisions in *Lassence* v. *Tierney* (2) and *Field* v. *Moore* (3) seem to me direct authorities against such a proposition.

But the decision below seems to have proceeded on the ground that, inasmuch as the husband and wife were here apart and hostile she could not be under any constraint, and that therefore the reason for the act failed, and must, it was said, always fail when they are, as it is figuratively said, "at arm's length."

(1) 7 Ch. D. 590.

(2) 1 Mac. & G. 551.

(3) 7 D. M. & G. 691.

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I think if the history of the law be examined, that the reasons why a married woman could not convey her landed property by any ordinary conveyance, but was able to convey it by fine, are not in any way dependent on the supposition that she was or might be under constraint. I do not repeat what has been already said by the Lord Chancellor. I agree with it. The practice introduced by the Judges, and afterwards recognised by statute, of refusing to allow a fine to be levied where a married woman was a party unless she was examined, no doubt was founded on this ground, but, however that may be, the existing law is regulated by the Acts for abolishing fines and recoveries and substituting more simple modes of conveyance. And the sections which the Lord Chancellor has read, and which I do not repeat, can in no way be read as saying that the instrument, which would be otherwise void, shall be valid if it be shewn that in fact she was not under constraint, and that the husband and wife were at arm's length. The provision in sect. 81, enabling the Court to dispense with the concurrence of the husband, but not to dispense with acknowledgment by the wife, is, I think, strong to shew that such was not the intention of the Legislature.

I have only further to say that if it had been proved that Mrs. Cahill had entered into this agreement knowing it was not valid, with intent thereby to keep her husband from proceeding to enforce his rights in expectation that he might die and so be unable to enforce them, I am by no means prepared to say that it would not have been a fraud, such that a Court of Equity might have forced her to renounce the advantage which she had reaped from the delay thus iniquitously obtained. But there is not the least ground for believing that the negotiations were not in the beginning bonâ fide. There is some ground for thinking that afterwards Mrs. Cahill did entertain some such notion, and this is what has made me feel most doubt on the facts. But I think she did not thereby obtain any benefit, or cause him to lose any advantage, for her game of fast and loose was not begun until it was no longer practicable to have brought either suit to a hearing in his lifetime.

I agree, therefore, that the judgment should be as the Lord Chancellor has proposed. The general rule is that the costs of

the appeal are given to the party who on the legal question succeeds.

LORD WATSON:—

My Lords, I am of opinion that the judgment under appeal ought to be reversed, because I have been unable to find satisfactory evidence that at any period of time there existed between the appellant and the late Mr. Cahill that consensus in idem which is necessary to the constitution of a contract.

I also, so far as I am capable of forming an opinion on the matter, agree with the views which your Lordships have expressed in regard to the law applicable to this case, on the assumption that there was a mutual contract by the spouses sufficient to satisfy the Statute of Frauds.

LORD FITZGERALD:—

My Lords, I concur in the very elaborate judgments of the Lord Chancellor and of Lord Blackburn, and I propose to add but a very few observations.

My Lords, if it was necessary for us to come to a decision as to whether there was a concluded agreement between the plaintiff and her deceased husband, and signed by her so as to comply with the provisions of the Statute of Frauds, I should have come to the conclusion that there never was such a concluded and signed agreement, for the reasons given by your Lordships in this House and by Lord Justice Fitzgibbon in the Court of Appeal, but as your Lordships' judgment is not to rest on that foundation, I abstain from further observation on it.

The question on which your Lordships are asked to determine the rights of the parties assumes that the document of the 20th of April 1877, represents a concluded agreement signed by the plaintiff. But is that agreement binding on her and capable of being enforced against her and her estate, having regard to her disability at the time, and to the absence of any acknowledgment by her under the provisions of the Statute for the Abolition of Fines and Recoveries? On this question I have not from the beginning entertained any doubt, save such as must necessarily arise in differing from the learned and careful Vice-Chancellor of

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Ireland in the primary Court, and the majority of the judges in the Court of Appeal. I have found some difficulty in discovering how this question was dealt with by the majority of the judges in the Court of Appeal. The Lord Chancellor of Ireland, in his very eloquent judgment is represented to have said: "If I am right in holding that for the purposes of this case, and under the circumstances we are considering, the plaintiff should be regarded as a feme sole, the argument as to the want of the formalities prescribed by the statute and necessary to validate the acts of a married woman disposing of or dealing with real estate, seems to me to fail altogether;" and he seems to have made that position so far the foundation of his judgment; but, in my opinion, that position is wholly untenable, and would, in truth, be to evade and to contravene the provisions of the statute. There is no authority to support the view of the Lord Chancellor of Ireland, and no case to be found in the books in which such an executory agreement has been enforced against the wife.

Lord Justice Deasy seems to have rested his decision on a different ground, for he says: "Then is that agreement binding on her notwithstanding coverture? It was contended that a married woman cannot dispose of or deal with real estate except according to the provisions and with the formalities of the Act for the Abolition of Fines and Recoveries. That is true in general, but there are well settled exceptions to it which all resolve themselves into the proposition that a married woman will not be allowed to avail herself of her legal disability in order to commit a fraud;" and he then proceeds to refer to *Ardesoife* v. *Bennet* (1) and a number of other well-known cases, but none of which, when properly considered, seem to affect the question before us.

The most direct answer to the Lord Justice's proposition is that the circumstances of this case present no case that can properly be considered as one of fraud, and that if fraud was at any time alleged it was deliberately given up and abandoned in the Court below. This very important question does not seem to have received from any of the judges in the Court of Appeal, save from Lord Justice Fitzgibbon, that full con-

(1) 2 Dick. 463.

sideration which its great importance required. Lord Justice Fitzgibbon does deal with the question in a masterly manner, and after an exhaustive judgment, in which he examines *Lassence* v. *Tierney* (1), *Field* v. *Moore* (2), and all the cases that bear on the question, and the reason of the thing, he thus concludes: "So here I hold that the contract of Mrs. Cahill to release her jointure was a contract which by reason of the nature of the property was controlled by the Fines and Recoveries Act, and until the formalities prescribed by that statute had been complied with, was not a perfect obligation nor capable either at law or in equity of specific performance, or of binding the estate which it proposed to affect." I agree in that conclusion, and we have but to refer to the terms of the statute to see the reason and necessity for it.

The deed by which under the general enabling clause of the Fines and Recoveries Act a married woman is enabled to dispose of lands or release her right to real estate depends for its validity and effect on "acknowledgment," which for wise purposes is not to be permitted until she has been examined touching her knowledge of the instrument and her free and voluntary consent to it. The acknowledgment, when duly made, has a retroactive operation, and gives effect to the deed from the period of its execution, and it is observable that the statute gives a power to the Court of Common Pleas to dispense with the husband's concurrence for various grounds of incapacity, or if he shall be separated from or living apart from his wife. But this power of the Court is to be exercised judicially and on proper evidence laid before it. It seems to me that we have no authority to dispense with the wise and salutary provisions of this statute, nor can we assist in contravening its provisions, or allowing it to be evaded. I concur entirely with your Lordships' judgment on this question, and I say, with Lord Justice Turner, "The law has empowered married women to alienate their estates by deed acknowledged under the statute. It has, for the wisest reasons, given them no further power" (3).

We are asked to bind the real estate of the plaintiff, not being her separate estate, by an agreement entered into with her

(1) 1 Mac. & G. 551. (2) 7 D. M. & G. 691, 717. 2 Jur. N.S. 145.
(3) 7 D. M. & G. 718. 2 Jur. N.S. 152.

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husband but not acknowledged. I concur in the opinion that it is not binding on her or on her estate, and that we have no power to give effect to it.

There were other questions discussed at the bar on which I would desire to express my opinion if it was necessary to do so—such as whether the document of the 20th of April 1877 if it amounted to an agreement, was such an agreement, and entered into under such circumstances, as that equity would become active to enforce it—and also the meaning of what the Lord Chancellor of Ireland designates as the "spontaneity" of that supposed agreement. I refrain, however, from doing so, as it has become unnecessary for the purposes of our decision.

Order appealed from reversed, with a declaration that the appellant is entitled to judgment for the execution of the trusts of the settlement of the 1*st day of February* 1876 *and an account in conformity with her statement of claim, and also to her costs of suit; and that the counterclaim of the respondents Michael Hussey Cahill and John Nugent Cahill should be dismissed with costs; and that the appellant should have her costs of the appeal to the Court of Appeal in Ireland; the said respondents to pay the appellant's costs of this appeal. Cause remitted to the Chancery Division (Ireland).*

Lords' Journals 9th May 1883.

Solicitor for appellant: *W. T. Manning*, for *C. Taylor*, Dublin.
Solicitors for respondents: *Holmes, Anton, & Greig*, for *S. O'Shaughnessy*, Dublin.

[HOUSE OF LORDS.]

GEORGE MARTIN HUGHES . . . . . APPELLANT;

AND

JOHN PERCIVAL . . . . . RESPONDENT.

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1883
June 4.

Principal and Agent or Contractor—Liability of Principal for act of Contractor —Adjoining Landowners, Liability of.

The appellant and respondent were owners of adjoining houses between which was a party-wall, the property of both. The appellant's house also adjoined B.'s house and between them was a party-wall. The appellant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party-wall between it and the respondent's house, so that if one fell the other would be damaged. In the course of the rebuilding the builder's workmen in fixing a staircase, negligently and without the knowledge of the appellant, cut into the party-wall between the appellant's house and B.'s house, in consequence of which the appellant's house fell, and the fall dragged over the party-wall between it and the respondent's house and injured the respondent's house. The cutting into the party-wall was not authorized by the contract between the appellant and his builder :—

Held, affirming the decision of the Court of Appeal, that the law cast a duty upon the appellant to see that reasonable care and skill were exercised in those operations which involved a use of the party-wall belonging to himself and the respondent, exposing it to the risk above-mentioned; and that the appellant could not get rid of responsibility by delegating the performance to a third person; and was liable to the respondent for the injury to his house.

Bower v. *Peate* (1 Q. B. D. 321) commented on.

APPEAL by the defendant from an order of the Court of Appeal (Baggallay and Brett L.JJ., Holker L.J. dissenting) affirming an order of the Queen's Bench Division (Lord Coleridge C.J. Manisty and Bowen JJ.) in favour of the plaintiff.

The facts (which for the purposes of this report are sufficiently stated in the head-note) are set out at length in the report of the decisions below (1), where it will be seen that the difference of opinion in the Court of Appeal arose from a difference in the views taken of the facts; Holker L.J. considering that the hazardous part of the work was over before the workmen began

(1) 9 Q. B. D. 441.

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to fix the staircase; Baggallay and Brett L.JJ. considering that it was not.

May 8, 9. *Philbrick* Q.C. and *Douglas Kingsford* for the appellant:—

There is nothing to take this case out of the ordinary rule that "if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence the employer is not answerable": *Pickard* v. *Smith* (1). The exceptions to the rule are—1. Where if the employer did the work himself he would do it at his peril: *Rylands* v. *Fletcher* (2). 2. Where the duty of doing the work is imposed by law on the employer: *Gray* v. *Pullen* (3). 3. Where the work involves an interference with the right of another, e.g. the right to support: *Bower* v. *Peate* (4); observations of Lord Blackburn in *Dalton* v. *Angus* (5). It is not enough that the work should be dangerous if there is no interference with a right: *Allen* v. *Hayward* (6); *Steel* v. *South Eastern Railway Company* (7); *Gayford* v. *Nicholls* (8). To cast the liability on the employer the work must be necessarily dangerous, not merely dangerous if carelessly performed: *Milligan* v. *Wedge* (9). Here the work was not unlawful as in *Ellis* v. *Sheffield Gas Consumers Company* (10). The fixing of girders into the plaintiff's party-wall was a proper user of the wall under the Metropolitan Building Act (18 & 19 Vict. c. 122) s. 83 sub-s. 11, and was consented to by the plaintiff. There was no interference with any right of support, the plaintiff's house being new. Even if it be held that there was danger necessarily incident to the rebuilding for which the defendant would be answerable, all the dangerous work had been safely completed when the damage was caused. The placing of the wooden staircase was entirely unattended by risk. Had it been executed by another contractor six months later the defendant could not have been

(1) 10 C. B. (N.S.) 470, 480.
(2) Law Rep. 3 H. L. 330.
(3) 5 B. & S. 970.
(4) 1 Q. B. D. 321.
(5) 6 App. Cas. 740, 829.
(6) 7 Q. B. 960.
(7) 16 C. B. 550.
(8) 9 Ex. 702.
(9) 12 A. & E. 737; 4 Per. & Dav. 714.
(10) 2 E. & B. 767. 18 Jur. 146

held liable, and it can make no difference that it was included in the same contract with other operations. The duty is put too high for the plaintiff; it is to take reasonable precautions. A man need not guard against highly improbable accidents: *Pearson* v. *Cox* (1). No one could have foreseen that the workman would cut into the wall.

Webster Q.C. and *M'Call* for the respondent:—

The hazardous work was not over till the house was substantially finished, and the staircases are a substantial part of a house. It was the duty of the defendant to take precautions against the removal of support till the dangerous work was over. The extent of the liability is greater than that contended for by the defendant: *Bower* v. *Peate* (2); *Gray* v. *Pullen* (3); *Tarry* v. *Ashton* (4). The workman acted negligently but bonâ fide. If the work was such that he might think, though erroneously, that it was necessary to cut into the wall the defendant is liable.

Douglas Kingsford replied.

The House took time for consideration.

June 4. LORD BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal dismissing an appeal from an order of the Queen's Bench Division, discharging a rule obtained by the defendant to enter judgment on the ground that the judge ought to have directed a verdict for the defendant, or that there should be a new trial.

The first point to be considered is what was the relation in which the defendant stood to the plaintiff. It was admitted that they were owners of adjoining houses between which was a party-wall the property of both. The defendant pulled down his house and had it rebuilt on a plan which involved in it the tying together of the new building and the party-wall which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The defendant had a

(1) 2 C. P. D. 369.
(2) 1 Q. B. D. 321.
(3) 5 B. & S. 970.
(4) 1 Q. B. D. 314.

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right so to utilize the party-wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall, exposing it to this risk. If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

This is the law I think clearly laid down in *Pickard* v. *Smith* (1), and finally in *Dalton* v. *Angus* (2). But in all the cases on the subject there was a duty cast by law on the party who was held liable. In *Dalton* v. *Angus* (2) and in *Bower* v. *Peate* (3) the defendants had caused an interference with the plaintiff's right of support. Chief Justice Cockburn it is true in *Bower* v. *Peate* (4) after shewing this says: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

(1) 10 C. B. (N.S.) 470.
(2) 6 App. Cas. 740.
(3) 1 Q. B. D. 321.
(4) 1 Q. B. D. 321, 326.

I doubt whether this is not too broadly stated. If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and indeed not being a Court of Error had no power, to alter the law laid down in *Quarman* v. *Burnett* (1).

But if I am right in thinking that the defendant in consequence of his using the party-wall of which the plaintiff was part owner had a duty cast upon him by law, similar to that which in *Dalton* v. *Angus* (2) it was held was cast upon the defendant in that case, in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to inquire how far this general language should be qualified.

I do not think the case of *Butler* v. *Hunter* (3) is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer I am obliged to differ from them.

If this be so the question is, I think, narrowed to this: Was the operation, during which the defendant's duty required him to see that reasonable care and skill should be used, over at the time when those engaged in the work cut into the party-wall between the defendant's house and Barron's? For it is not disputed that there was a want of skill in doing this, and that it caused the damage; and it is not disputed that the men who did it were intending to carry out the work on which they were employed.

The defence opened at the trial, I think, was directed to this, that the contractor was bound not to do anything without written authority, and that there was no authority at all to cut into the party-wall. I do not think that could prevent the act which was done from being in breach of the defendant's duty.

(1) 6 M. & W. 499. (2) 6 App. Cas. 740.
(3) 7 H. & N. 826.

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The late Lord Justice Holker however thought, as I understand him, that the whole of the operation connected with the use of the plaintiff's party-wall was over, and that the contractor's men were engaged in a subsequent independent job, and that the defendant was under no further duty then than he would have been if, after the house was finished, he had brought in carpenters to repair a wooden staircase. I cannot, however, take this view of the counsel's opening. I regret that the case was stopped on the counsel's opening, for I feel convinced that if the evidence had been gone into this view of the fact could not have been taken. As it is, I do not think it necessary to say more of the view of the law taken by the late Lord Justice than that I think it well worthy of consideration in any case where the facts are as he seems to suppose.

I think that the order appealed against should be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, in this case I have had great difficulty in forming an opinion satisfactory to my own mind, not because of any doubt as to the law, but because I do feel doubtful whether I rightly apprehend the facts which I ought to assume as the basis of my judgment. It is very much to be regretted that the case was not submitted to the jury. Had that course been followed it is certain that the facts would have been ascertained, and it is highly probable that no question of law would have arisen. As it is, we are left to discover the facts upon which our judgment must depend from a very long and argumentative statement made by the appellant's counsel; and in regard to the true import of that statement the parties at the bar widely differed. Accordingly we heard quite as much argument about the meaning of what Mr. Philbrick said to the jury, as upon the law of the case. In the Court of Appeal the result of this unsatisfactory state of matters was, that the late Lord Justice Holker took a somewhat different view of the facts from his colleagues, which led him to a different result in law.

Had your Lordships not thought otherwise I should have been inclined to send the case back to the jury for their determination.

It is in my opinion neither satisfactory nor expedient to decide important questions of law upon a hypothetical statement of facts; especially when the litigant parties are not agreed as to the meaning of the statement. Here the appellant says that his counsel meant to indicate to the jury that he was about to prove or would try to prove certain facts. The respondent on the other hand says the statement of the appellants' counsel, when carefully read and construed, indicates that he meant to prove something materially different from these facts. I feel a great dislike to criticising the oral statements of a counsel as if they were part of the record, and conceive that I am bound to construe them most liberally in favour of his client. I rather think that Lord Justice Holker must have been to some extent influenced by these considerations in putting a different construction upon Mr. Philbrick's language from that which was adopted by the other members of the Court of Appeal. Although I do not agree with the view taken by the late Lord Justice, I am not certain that I take precisely the same view of the facts with your Lordships; and it is on that account that I have thought it necessary to explain the grounds upon which I have come to the same result.

I agree with your Lordships that it was the duty of the appellant in carrying out his building operations to see that reasonable precautions were taken in order to protect from injury the eastern wall of his tenement, of which the respondent was part owner. The appellant does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party-wall, if no precautions were used; nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by his counsel) allege, and offer to prove before the jury, was that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house.

Now looking to the terms of the contract and specification I think it does appear that extensive structural operations fraught with obvious risk to the party-wall in question had been carefully

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and successfully executed; and if I had been able to come to the conclusion in fact that after these were completed there remained nothing to be done by the contractor which could reasonably be supposed to involve danger to the party-wall, I should have been disposed to agree with Lord Justice Holker. I do not think that the combination in one contract of operations hazardous, and operations in no reasonable sense hazardous, can affect the character of these operations, or impose upon the employer legal duties and liabilities to which he would not have been subject had he employed a different contractor for each operation.

But I am not satisfied that the fitting-up of a wooden staircase from the basement floor of the appellant's tenement to the cellar below was an operation which could occasion no risk to the party wall. It was an operation which might be executed in at least two different ways, either by cutting a groove in the south party wall, and inserting in it one of the wooden stringers supporting the stair (which would probably make the neater job), or by leaving the wall untouched and fixing the staircase outside it. I see no reason to doubt that the latter method would have been unattended with danger to the wall against which the stair was to be placed, or to the party-wall in which the respondent is interested. The other method was, as the result shewed, attended with serious danger to both these walls; and I cannot find any suggestion in the statement made by the appellant's counsel to the effect that no one could have reasonably anticipated that a workman might cut the wall in order to let in a stringer. The statement which was very strongly and repeatedly made regarding it is, that the cutting of the wall was unnecessary, and was not only unauthorized, but positively forbidden. Unnecessary it certainly was, because the staircase might have been securely fixed without interfering with the wall. Unauthorized and forbidden it also was, in this sense, that by the terms of the contract and relative specification, the contractor was bound to leave the wall untouched. But the terms of the contract and specification are, in my opinion, of no relevancy as in a question with the respondent. If there were any reason to suppose that an ordinary workman entrusted with the job might cut into the wall, the appellant took a very proper precaution when he bound his contractor not to cut

it, but he failed in his duty to the respondent when he permitted the contractor, and his workmen, to neglect that precaution.

I am of opinion that the appellant could not establish a good defence to the respondent's claim, by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall. I can find no allegation to that effect, nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances the only inference in fact which I can draw is that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction. These precautions ought, no doubt, to have been taken by the contractor; but in accordance with the principle laid down in *Bower* v. *Peate* (1) and *Dalton* v. *Angus* (2) it was no less the duty of the appellant, as in a question with the respondent, to see that they were strictly observed.

LORD FITZGERALD:—

My Lords, the question in this case seems to be rather one of controverted fact than of law. The defendant did not endeavour to escape from the principles to be deduced from *Dalton* v. *Angus* (2); *Tarry* v. *Ashton* (3); *Bower* v. *Peate* (1), and *Pickard* v. *Smith* (4), or deny their applicability; and on the other hand the plaintiff's counsel admitted the law as stated by the defendant's counsel.

For the defendant it was contended that the work on which the defendant was engaged, if originally hazardous, had ceased to be so, inasmuch as all that was hazardous had been completed, and

(1) 1 Q. B. D. 321.
(2) 6 App. Cas. 829.
(3) 1 Q. B. D. 314.
(4) 10 C. B. (N.S.) 470.

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that the particular work which was being done was not dangerous in itself or likely to produce danger, and that the wrongful or negligent act of the workmen, which it was said caused the calamity, was entirely collateral and wholly unauthorized.

I agree with the noble and learned Lord (Blackburn) in regretting the course taken at the trial, for I cannot help thinking that if the evidence had been fully gone into we would probably not have heard of the case. We are now obliged to take our view of the facts from the opening statement, at the trial, of the defendant's counsel, and I have considerable doubt whether the real cause of the fall of the defendant's new house is not traceable to another and different source than that which has been assumed, and which if ascertained as a matter of fact might have exonerated the contractor, and rendered clear the liability of the defendant. The undertaking the defendant was engaged on was, no doubt, as a whole, perilous to his neighbours on both sides, and such as to render care and precaution necessary at every step, until the whole of the new structure was substantially completed; or so far at least, that nothing remained to be done which could affect the stability of either of the party-walls.

Part of the original design was that the party-wall at Barron's side should be taken down and rebuilt from top to bottom. Thus we find that the specification provides: "The contractor to take down the party-wall of adjoining building in the Haymarket, and cart away all the old bricks and rubbish, grub up old foundations, and prepare levels for rebuilding new party-wall."

The defendant's counsel Mr. Philbrick in one part of his statement said, "Now I ought to mention to you one very important fact, and it is this: There was the party-wall which stood between Barron's house and the house here, which was to be rebuilt by Mr. Hughes. This party-wall, it was proposed by Mr. Wimble and assented to by Mr. Hughes on these plans and specifications, should be entirely taken down and rebuilt. Mr. Hughes would have to be at the expense of doing so because he was the building owner."

In place of carrying out the specification, the plan was departed from as to this old party-wall: it was underpinned and then up to the first floor (about fourteen feet high) left untouched; but from that point upwards a new party-wall was built on it, and

necessarily of greater height and greater weight than the old wall. It was the old portion of this party-wall which gave way, and by its fall caused the fall of the defendant's house, and the displacement of the girder which was clinched into the plaintiff's party-wall, and caused the mischief of which the plaintiff complains.

If Barron's party-wall had been entirely rebuilt, as it ought to have been, it is not at all probable that the calamity would have occurred. A new brick wall has great cohesive power, and as it would be smooth, no chipping or hacking would be necessary to fit on the stairs, and it would probably be unaffected by chipping or hacking, and even cutting into it to fit the wooden staircase or the stone steps would not affect its stability so as to create danger. As to the old wall it was different; it was of unknown antiquity, and the part that was left seems to have been weak, out of plumb, with an uneven and rough front which according to the specification was to be hacked off and levelled, and it had a great superincumbent weight of new work placed on it. It yielded, from its inherent weakness, to the cutting and shaking it received in the process of fixing the wooden and stone steps, and came down. Mr. Philbrick thus describes it: "Then from the first floor, up to the second floor, it was intended to have a flight of stone steps, the ends to be let into the wall from which they depend—pinned into the wall; that involves of course cutting into the wall a sufficient depth and plugging up the holes, after you have got the end of the step in. But they began at the bottom, and got the bottom step with the door on the floor morticed, or let into the wall, pinning it into the wall properly at one end and filling that up with cement, and then the next step is fixed above it, and the next above that, and so you go on according to the slope at which your staircase rises. The men were fixing on the day of the accident this flight of stone steps. But independently of that, the men who were employed by Messrs. Newman & Mann, the carpenters, were also fixing a flight of steps which led down into the basement—wooden steps; and without any knowledge of the foreman of the works, and without any order from him, without any knowledge at all of either of the architects, or anything shewn on the plan to that effect, or prescribed in the specification, the workman had on his own head, and as it were utterly

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unauthorized, cut into the wall below the level of the ground floor, that is to say, the lower portion of the party-wall which had been left—he cut into it." He then describes the fall: "The whole appeared to collapse in the centre, to go down, no doubt partly or chiefly set in motion by the fact that this party-wall had been, by the unauthorized act of the workmen, unduly and improperly weakened; that had set the thing going, and the girders gave way; the wall gave way and the collapse took place as I have described."

The act of the workmen may have been unauthorized and ill-judged, but it was an act no doubt done in the execution of the work entrusted to them, and can in no case be said to have been entirely "collateral;" and it is not to be forgotten that the contract provides that "complete copies of the drawings and specifications are to be kept on the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the contractors, and to whom instructions can be given by the architects," and who is of course to direct the workmen in their operations, and who ought to see that what they are doing is necessary and lawful, and carried out in the safest manner.

Then was the perilous portion of the work completed before the doing of the act which it is said led immediately to the fall of Barron's party-wall and the consequent injuries to the plaintiff's premises? I should have answered that question in the negative without any hesitation, if it had not been for the opinion expressed by the late Lord Justice Holker, which I receive with the utmost respect.

The event shews that the danger was not over, and I should have thought that it could not be as long as anything was being done that could affect the stability of either party-wall. Lord Justice Holker seems to have been of opinion that though the operation as a whole was perilous, yet that the peril had ceased though the work was not completed. He says as to the particular portion of the work: "It seems to me perfectly clear that it was not hazardous work, and the workmen exceeded their duty; they made a mistake." But is it open to us to divide the work thus into sections and say, "As to a particular part, taken by itself, it carried with it no special peril, and you the defendant are not responsible?" It seems to me that this cannot be done. We

would not be justified in thus breaking it into parts, or considering the case as if the putting in the stairs or the stone steps was the sole work which the defendant was getting done. The conclusion I have reached is, that the defendant had undertaken a work which as a whole necessarily carried with it considerable peril to his neighbours. In the execution of that work the party-wall at Barron's side was so injured that it fell in, and its fall dragged down the new building and injured the plaintiff's party-wall and premises.

What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be culpa levissima.

It seems to me that the peril to the plaintiff's premises continued as long as there remained anything to be done which could interfere with the stability of the girder on which the defendant's house rested, and which the defendant had fastened into the plaintiff's party-wall, and that there was that want of due supervision and due precaution which makes the defendant liable.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 4th June 1883.

Solicitors for appellant: *Hughes, Hooker, Buttanshaw & Thunder.*

Solicitor for respondent: *T. R. Apps.*

[HOUSE OF LORDS.]

H. L. (E.) 1883 June 7.

CHARLES ROBERT DANFORD . . . . APPELLANT;

AND

SILVESTER McANULTY . . . . . RESPONDENT.

Practice—Pleading—Action for recovery of Land—Rules of Court 1875, *Order* XIX. *rr.* 15, 17.

In an action for the recovery of land a statement of defence alleging that the defendant is in possession operates (by virtue of Order XIX. rule 15 of the Rules of Court, 1875) as a denial of the allegations in the plaintiff's statement of claim, and requires the plaintiff to prove them.

So *held*, affirming the decision of the Court of Appeal.

APPEAL from an order of the Court of Appeal (Bramwell, Baggallay, and Brett L.JJ.) reversing a judgment of Stephen J. in favour of the plaintiff.

The facts are fully set out in the report of the decision below (1), and in the judgment of the Lord Chancellor in this House.

June 1. *Arthur Charles* Q.C. and *A. Gwynne James* (*W. Graham* with them) for the appellant. Under the old practice there were no pleadings in ejectment, and pleadings having been introduced by the Judicature Acts, Order XIX. rule 4 applies and requires a plaintiff in ejectment to state the links of his title (per Bramwell L.J. *Philips* v. *Philips* (2)), so that the defendant may admit or deny all or any one or more allegations. Rule 15 relieves the defendant from pleading his title except in certain cases. Rule 17 must be read with rule 15 and applies to ejectment except so far as limited by rule 15. The object of rule 15 is to enable a defendant, under a simple allegation of possession, to prove possession for twelve years, or a conveyance or demise from the plaintiff, or any like defence. That rule deals only with the defendant's, and not with the plaintiff's, title, as shewn by the opening words of the rule. The defendant need only

(1) 6 Q. B. D. 645. (2) 4 Q. B. D. 127.

have traversed or admitted the plaintiff's allegations. The Court of Appeal were wrong in referring to the intention of the framers of the rule, which must be construed by its expressions. The practice of pleaders has differed; some denying the allegations of the plaintiff specifically, others not.

Mellor Q.C. (*Dugdale* Q.C. with him) for the respondent. The reason for compelling the plaintiff to state his title is because speculative actions were brought and the defendant had to interrogate him as to the nature of his title. The object of rule 15 is to preserve the old right of a defendant in possession to require the plaintiff to prove his case.

Arthur Charles Q.C. replied.

The House took time for consideration.

June 7. EARL OF SELBORNE L.C.:—

My Lords, the plaintiff (appellant in this case) brought an action against the defendant for the recovery of certain land. In his statement of claim he set forth the particulars of the title on which he sought to recover. The defendant, in his statement of defence, pleaded possession, without going on expressly to deny, or to say that he did not admit, the allegations of fact contained in the plaintiff's statement. At the trial before Stephen J. the plaintiff insisted that by this form of pleading on the part of the defendant he was relieved from the necessity of proving his own case, and that all the facts alleged by him must be taken to be admitted by the defendant. The learned Judge was of that opinion; and (after offering the defendant liberty to amend, on special terms which the defendant did not accept) he gave judgment for the plaintiff, without requiring him to go into any evidence in support of his case. The Court of Appeal set that judgment aside, and directed a new trial.

The question, whether the order of the Court of Appeal was right, depends entirely upon the proper construction and effect of two of the Rules of Court as to pleading (rules 15 and 17 of Order XIX.) scheduled to the Judicature Act of 1875. By the

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4th rule of that order (which requires pleadings in all actions) it is provided, generally, that "every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies"; and the 17th rule (which is equally general) provides, that "every allegation of fact in any pleading in an action, . . . if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition." If there had been no provision specially applicable to actions of ejectment, these two rules, standing alone, would (no doubt) have established the appellant's case. But there is such a special provision in rule 15, which is interposed between them. It is thus expressed: "No defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. *But except in the cases hereinbefore mentioned it shall be sufficient to state by way of defence, that he is in possession.* And he may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned."

The appellant says, that the effect of the 15th rule is only to limit the extent to which a defendant in ejectment would otherwise have been bound under rule 4 to set forth in his pleading the particulars of his own title; and that it does not make a mere averment of possession sufficient to put the plaintiff to the proof of the title alleged by him, unless the truth of the plaintiff's averments, in his statement of claim, is expressly traversed or put in issue by the statement of defence. The respondent, on the other hand, says, that such a limitation of the effect of the 15th rule is inconsistent with the natural and literal meaning of the words "it shall be sufficient to state, by way of defence, that he is in possession": the traverse of the plaintiff's averments, in those cases in which it is required by the 17th rule, being unquestionably part of the defence, and of the statement by way of defence. He adds, that the appellant's construction makes that part of the 15th rule inofficious, and gives to the whole rule no more

effect than if it had contained the first and last clauses only, the middle clause being altogether omitted. And he contends that the construction which gives every word of this rule its full and natural sense, and makes every part of it officious, is also the more probable and reasonable; because the other construction would not be consistent with the principles of the former practice in actions of ejectment, an intention to adhere to which (in substance) may be presumed from the fact that it was thought necessary in these rules of procedure to make special and exceptional provision for that class of actions.

I am of opinion that in this contention the respondent is right. The appellant's argument treats the word "defence" in the 15th rule as equivalent to "title," and the whole rule as meaning only that a defendant in ejectment need not set forth any legal title in defence of his possession. But he would not have been obliged to do this if there had been no such rule. It must, therefore, have been the purpose of the rule to cover the whole ground of the necessary defence in such an action. Rules of procedure ought to be clear practical directions, not pitfalls for suitors. To tell a defendant in ejectment that "it shall be sufficient to state by way of defence that he is in possession," and then to hold that if he does this, and no more, in his statement of defence, he is to be taken as admitting the truth of the plaintiff's case, as alleged by him on the record, is to make the rule a snare to him. On the other hand the 15th rule, as the respondent interprets it, may very well stand with the 17th, which does not require any express traverse of the plaintiff's averments, if a traverse may be inferred "by necessary implication." Where a defendant makes an averment which by a preceding rule is declared to be "sufficient by way of defence," in an action of a certain kind, it seems to me to follow by necessary implication that he intends thereby to put the plaintiff who is suing him in an action of that particular kind to the proof of his title, as much as if he had expressly denied, or had expressly stated that he did not admit, the whole and every one of the allegations of title contained in the plaintiff's pleading.

I am therefore of opinion that the order appealed from is right, and that this appeal ought to be dismissed with costs, and I so move your Lordships.

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LORD O'HAGAN :—

My Lords, I entirely concur with the view taken by the Lord Chancellor, and I have scarcely anything to add; but I think it right to say, in reference to the argument in the Court below and to some expressions of opinion on the part of the learned judges there, that my view of the case does not depend at all upon a mere statement, authoritative though it be, and true as it unquestionably is, that the intention of the framers of these rules was in accordance with the views contended for by the defendant. We cannot act upon intention, either in the case of a statute or in the case of a rule; we must have the intention carried into effect; and if the intention is stated to have been such that the terms either of the rule or of the statute contravene it or are in any way inconsistent with it, we cannot have regard to that intention; we can only say, either in the case of the judges or in the case of the Legislature, what the judges or the Legislature have actually done. It is manifestly impossible to enter upon such an inquiry without confusion and serious risk of defeating the ends of justice. In the case of the judges, it may be more easy to find out exactly what they felt and wished than in the case of the Legislature, but still the difficulty would be enormous. We cannot act upon intention.

In this case we have very strong testimony as to the purpose with which this rule was framed by the judges, who were afterwards to administer it. In a sense, this is put forward as a contemporaneous exposition of its meaning, and in the course of conversation rather than of argument, in the Court below, it was stated, in answer to the present Master of the Rolls, that the question before us had not practically arisen, and that the Court might infer an agreement of the judges and the profession in favour of the contention of the respondent. If it was so, I think that agreement was right, regard being had to the principles on which Acts of Parliament and rules equivalent to Acts should be construed. We have to consider the state of the law at the time, and the object of the change, if a change was made. From time out of mind it was established that a plaintiff in ejectment must recover upon the strength of his own title, and that it was not necessary to go into anything on the part of the

defendant, who might put him at arm's length and require him to state why he was there at all. Now what was the object of the change? Looking to what was said in the Court below, it was not a change in the law—it was a change in practice, necessitated apparently by the incursion of equity upon the old domain of law; and that must be taken into account. I may say this further; in spite of this authoritative declaration, as it appears to be, in favour of a particular view, if it had been made out to my satisfaction that that view was untenable and opposed to the express terms of this rule, I should have been obliged, however reluctantly, to act upon that conception of the case. But in my opinion the ruling of the judges, so far as they have ruled upon it, and the alleged practice of the profession, are quite in accordance with the fair meaning of the rule, and at the same time in accordance with the contention of the respondent. It appears to me that the rule would be nullified if any other view was taken. The contention of the plaintiff amounts to this, that if a defendant does no more than plead, "I am in possession," he does in effect say, "I am in possession, and at the same time I admit everything you say. I admit every step of your title." Of course in the majority of instances that might admit conclusively the plaintiff's case. What is the benefit of that defence of possession, which is said by the rule to be sufficient, if any such conclusion can be drawn against the defendant?

I think upon the whole, that the view of the Lord Chancellor is right, and I quite concur in the motion he has made.

LORD BLACKBURN:—

My Lords, I also agree; and I agree in what the noble and learned Lord (Lord O'Hagan) has just now said, that these rules which are contained in the schedule to the Act are to be construed so as to discover the intention expressed in the rules, and that it is not a legitimate ground of construction for the person or persons who drew the rules to say, "We wished and meant to express a particular intention." I do not think that that would be a legitimate ground—in fact it has long been established that that is not a legitimate ground—upon which to construe any

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instrument in writing. But I think that the way in which we ought to construe these written instruments is by ascertaining what is the intention expressed by the words used; we are to consider what was the object which those who used the expressions had in view, and what was the subject-matter they were speaking about, and then to say, construing the words used with reference to such a subject-matter and to such an object, what is the intention expressed. Now taking that view, I entertain a very strong opinion indeed that the decision of the Court of Appeal, though not given, as I have already said, upon what seems to me exactly the right reason, was quite right and ought to be affirmed.

For a long time an action for the recovery of land at law was brought by ejectment, and it was so established as to be trite law—a commonplace expression of law—that in ejectment, where a person was in possession those who sought to turn him out were to recover upon the strength of their own title; and consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out must shew a superior legal title to his. If, however, they did shew that, still if the person who was in possession could shew that although they had shewn a superior legal title to the possession, yet he had an equitable ground for saying that they should not turn him out, he as the law stood was obliged to go to a Court of Equity, and as the plaintiff there, as the "actor" (to use a civil law expression), to make out that there was a sufficient reason for a Court of Equity to interfere, and to prevent his being turned out of possession, on this equitable ground.

That being the then state of the law, when those who had to frame the new rules in the schedule of the Act came to this question, they had to consider what should be done with regard to it; and I think that if the object was (which I can myself have very little doubt was the object) to say that in actions for the recovery of land the former state of pleading and the former mode of proceeding should remain unaltered, the words used in these rules express that intention. The 15th rule says, "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his

defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff." As I have already pointed out, that was exactly the existing state of the law. If he meant to set up such an equitable ground he had to shew it in order to get the interposition of a Court of Equity. Otherwise he had merely to set up the defence, "I am in possession, and you shall not come in until you shew a superior right to possession." That was the old rule of law. The new rule then goes on to say, "But except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned." If the object was what I confess I think it must have been, to leave the law as it was before, that expresses it, except that I rather think that if I had been framing these rules, instead of saying, "he may nevertheless rely," I should have said, "he may under that rely," but that is a very verbal criticism indeed and does not come to much.

Now if that be the construction of that rule, is the 17th rule to be construed in such a sense as to undo it? It is said that it does not undo it, that it merely says, "In addition to all this, if you do not wish to admit all that is stated by the plaintiff in his claim you ought to add six words, namely, 'And I do not admit his case.'" I confess that I feel very much as the Lord Chancellor did, that that would have been putting in a snare and a trap; and I do not think that that is what one can fairly construe the rule as meaning.

Something has been said about the practice having put an interpretation upon the rule; and if there had been a long enough time and parties had been acting upon a uniform notion of the practice, I should have been excessively reluctant to reverse it. But I do not think that during the years (nearly eight) which have elapsed since these new rules were made, there has been sufficient time to lead me to expect that a practice has grown up and that there is an established rule of construction regarding them. I think from what passed in the argument in the Court below, that there is no ground for believing that it has ever been decided, or that pleaders have been in the habit of

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pleading in any one particular way. Indeed I think that if a pleader for the defence had entertained the idea that by merely alleging that the defendant was in possession he might raise this question, he would hardly have been rash enough not to add the few words (which would have done him no harm) "and I do not admit the statements in the claim of the plaintiff." I should say that it is most likely therefore that the question has never been raised; but certainly it has not been shewn that there was any practice, any contemporanea expositio of these rules, which would be admissible to lead us to a construction of them. I therefore come back to saying that looking at the construction of the rules according to the ordinary canons of construction applied to written instruments, I think that the Court of Appeal have put the right construction upon them.

LORD FITZGERALD:—

My Lords, the 19th Order is headed "Pleading Generally," and seems to have been intended to regulate the then new system of pleading, but not to take away or lessen pre-existing rights. Rule 15 of that order is confined to a defendant in an action for the recovery of land who is in possession of that land, and it will be observed that the rule is exceptional and is inconsistent with some of the prior and subsequent rules of the 19th Order (e.g., rules 4, 18, 20). We must seek for an explanation of its peculiar significance by reference to the position and rights of everyone in actual possession of land, when called on to defend himself against a person claiming to oust him from that possession.

It is not necessary to involve ourselves in the consideration of the old action of ejectment as it stood prior to the Common Law Procedure Acts, or to present any explanation of that fictitious proceeding invented for the more easy trial of a right to the possession of land than by real action. The position of the real plaintiff in that abrogated form of proceeding was, that he could only succeed by establishing his right of property and his right of entry, and then, and not until then, was the defendant called on to answer, and he might rely on any case which shewed that the plaintiffs' right of entry had been barred. The Common Law Procedure Act abolished the fictitious proceeding, and gave

in its place a real summons directed to the parties in possession, calling on them to come in and defend their possession if they could. The principle of the proceeding and the rights of the parties remained otherwise wholly unaffected. The plaintiff could succeed only on the strength of his own title and could not found his claim on the weakness of the defendant's, for the law respected possession and deemed it lawful possession until some claimant established in proof that he had a title to the land and a right of entry to oust the defendant. The party who sought to change the possession should first shew a legal title to it in himself. As a general rule the issue in ejectment never was cast on the defendant; he relied simply on his possession and was not called on to say a word until the plaintiff had proved his title and right of entry.

The 15th rule of Order 19 is divisible into three parts. 1. The defendant need not plead his title unless it is equitable. 2. It is sufficient for him to state that he is in possession. 3. He may rely on any defence he can prove though he has not stated it. The obvious intention of this exceptional rule, if we are to construe it by its own light alone, seems to be to leave the defendant in an action for the recovery of land in the same position substantially as he was before the Judicature Act and Rules, that is to say entitled to rely on his possession as a sufficient denial of the plaintiff's title and a sufficient answer until the plaintiff had proved his title, and then enabling the defendant to rely on any defence he could prove though he had not pleaded it.

There is in substance no pleading in such an action after the statement of claim, unless it arises "puis darrein continuance." The defendant is not obliged to plead in the proper sense; he puts in a statutable defence, "I am in possession," and the plaintiff can do nothing but take issue on it and proceed to trial. The meaning of that defence is to me very plain. The plaintiff has set out his title in his statement of claim which must culminate in shewing that he has a right of entry—that should be the deduction from the preceding statement. The defendant, in saying that he is in possession, which means, as against the plaintiff, "lawful possession," in effect traverses that deduction and puts in issue the whole preceding statement of title. The

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statutable defence may be thus expanded, "I am in possession, and that is a good title against you until you prove a better title and right of entry." The concluding words of rule 15 open to the defendant every ground of defence which shews that the plaintiff's right of entry is barred.

The plaintiff relied however on rule 17; but once your Lordships have arrived at the conclusion that the defence "I am in possession" puts in issue by necessary implication the allegations of fact in the plaintiff's statement of claim, which are necessary to support his claim to a right of entry, all difficulty arising on the 17th rule ceases.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 7th June 1883.

Solicitors for appellant: *Remnant, Penley, & Grubbe,* for *W. E. Richardson, Birmingham.*

Solicitors for respondent: *S. W. Johnson & Son,* for *Robinson, Watts, & Jobson, Dudley.*

[HOUSE OF LORDS.]

ELIZABETH MADDISON . . . . . APPELLANT;

AND

JOHN ALDERSON . . . . . RESPONDENT.

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Contract, Parol relating to Interest in Land—Part Performance—Statute of Frauds s. 4.

An intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate :—

Held, that there was no contract, and that even if there had been and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.

Loffus v. *Maw* (3 Giff. 592) disapproved.

APPEAL from an order of the Court of Appeal (Bramwell, Baggallay and Brett L.JJ.) reversing a decision of Stephen J. (1). The facts are stated in the report of the decision of Stephen J. (2) and in the judgment of the Lord Chancellor in this House.

April 17, 19, 20 and 23. *Rigby* Q.C. and *W. D. Rawlins* for the appellant :—

The decision of the Court of Appeal, explained in *Humphreys* v. *Green* (3), is wrong. The Statute of Frauds cannot be set up when to do so would be in fact a fraud, e.g., where the other party has been led to alter his position by a parol promise. There may be a part performance of such a contract by acts such as have been proved in this case, sufficient to take it out of the statute. *Loffus* v. *Maw* (4) is undistinguishable. In equity a part performance by

(1) 7 Q. B. D. 174.
(2) 5 Ex. D. 293.
(3) 10 Q. B. D. 148, 160.
(4) 3 Giff. 592.

8 Jur. N. S. 667.

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which the party to be charged is benefited will bind the conscience of him and of those claiming under him: per Lord Redesdale in *Clinan* v. *Cooke* (1) citing *Foxcraft* v. *Lister* (2), decided in 1701. The acceptance of the consideration operates as a waiver of the statute: *Watt* v. *Evans* (3). The only exceptions to this rule are marriage, and payment of purchase-money: *Nunn* v. *Fabian* (4). Here the relations of the parties have changed; if they had gone on as before there would have been no binding contract, but there is novus actus interveniens (*Lacon* v. *Mertins* (5); *Parker* v. *Smith* (6)) so as to bring it within the principle laid down in *Loffus* v. *Maw* (7). The part performance in this case began as soon as the appellant decided not to leave the intestate's service, and as the contract has been wholly performed on her part she is entitled to ask for specific performance on the other side: *Whaley* v. *Bagnel* (8); *Bond* v. *Hopkins* (9); *Podmore* v. *Gunning* (10); Fry on Specific Performance, pt. 3 ch. 20 p. 415, 2nd ed. citing Gilbert C.B. Lex Prætoria p. 241 and other authorities; Story Eq. Jur. s. 772. No doubt the act must be unequivocal in relation to the agreement, but all that is required is an act from which a contract may be inferred: *Buckmaster* v. *Harrop* (11); *Frame* v. *Dawson* (12); *Morphett* v. *Jones* (13); *Mundy* v. *Jolliffe* (14); *Wilson* v. *West Hartlepool Railway Company* (15). In some cases the mere delivery of possession has been treated as part performance in equity: *Ungley* v. *Ungley* (16); *Coles* v. *Pilkington* (17). A representation of an intention to leave by will may operate as a contract, so as to entitle the promisee to specific performance: *Walker* v. *Walker* (18); *Hammersley* v. *De Biel* (19); *Goylmer* v. *Paddiston* (20); *Goilmere* v. *Battison* (21);

(1) 1 Sch. & Lef. 22, at p. 41.
(2) 2 Vern. 456; Colles Par. Cas. 108.
(3) 4 Y. & C. Ex. 579, Appx.
(4) Law Rep. 1 Ch. 35.
(5) 3 Atk. 1.
(6) 1 Coll. 608.
(7) 3 Giff. 592. 8 Jur. N.S. 607.
(8) 1 Bro. P. C. 345.
(9) 1 Sch. & Lef. 413.
(10) 7 Sim. 644.
(11) 7 Ves. 341.
(12) 14 Ves. 386.
(13) 1 Sw. 172.
(14) 5 My. & Cr. 167, 177.
(15) 2 De G. J. & S. 475, 485. 10 Jur. N.S.
(16) 5 Ch. D. 887.
(17) Law Rep. 19 Eq. 174.
(18) 2 Atk. 98.
(19) 12 Cl. & F. 45.
(20) 2 Vent. 353.
(21) 1 Vern. 48.

Maunsell v. *White* (1); *Needham* v. *Smith* (2); *Coverdale* v. *Eastwood* (3); *McCormick* v. *Grogan* (4), per Lord Westbury. If the intestate had become bankrupt his trustee would have taken the estate subject to the equities in favour of the appellant. This is the appellant's only remedy; the contract being in existence even if unenforceable, the appellant cannot sue for wages; *Britain* v *Rossiter* (5).

Davey Q.C. and *Gainsford Bruce* for the respondent:—

There was no contract, nor any evidence of one: a promise is not a contract. The alleged part performance was not referable to or in pursuance of any contract concerning land, or any contract at all. The appellant was free to leave whenever she liked and no action for damages or to enforce the alleged contract could have lain against her. Till the intestate's death there could be no contract, and therefore till then there could be no part performance. But if there was a contract it was not such as equity would enforce, even if an action would lie for damages for breach of it. To entitle to specific performance the acts must be unequivocal, i.e. they must necessarily lead to the inference of a contract affecting the land. This is the only rule which underlies all the cases and which is consistent with principle, though there may be expressions in some cases going further. The only apparent exceptions are *Parker* v. *Smith* (6) (which is no authority for any contrary principle) and *Walker* v. *Walker* (7); at which time it was held that almost anything would do as part performance; e.g. payment of money: *Lacon* v. *Mertins* (8). No evidence can be given of the contract until some act is shewn which will lead the Court to assume there was such a contract. In every decided case possession of the land has been an ingredient; and the acts must have been unequivocal: *Gunter* v. *Halsey* (9); *Wills* v. *Stradling* (10); *Surcome* v. *Pinniger* (11);

(1) 4 H. L. C. 1039.
(2) 4 Russ. 318.
(3) Law Rep. 15 Eq. 121.
(4) Law Rep. 4 H. L. 97.
(5) 11 Q. B. D. 123.
(6) 1 Coll. 608.
(7) 2 Atk. 98.
(8) 3 Atk. 1.
(9) Ambl. 586.
(10) 3 Ves. 378.
(11) 3 D. M. & G. 571.

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Pain v. *Coombs* (1). *Loffus* v. *Maw* (2) is a solitary case founded on a confusion between contract and representation, and on a misunderstanding of *Hammersley* v. *De Biel* (3). Specific performance of a contract to devise land has never been decreed except in *Goilmere* v. *Battison* (4), where there was an option, and it was construed as a covenant to *settle* land (see extract from Register's Book). See also *Needham* v. *Smith* (5); and *Logan* v. *Wienholt* (6). There is no case where a covenant to leave land by will has ever been held to bind the land. A man cannot be decreed to make a will: the heir can only be disinherited according to the forms of the Statute of Wills. Here the land was not bound: there was no equitable conversion.

Rigby Q.C. in reply:—

The only thing necessary to turn the promise into a contract was that the appellant should stay, which she did. The Statute of Frauds may not be set up where there has been fraud or anything in the nature of fraud. The reason why part performance has generally had reference to the land is that most of the cases have related to land. In the case of exchange of two pieces, acts done on one piece have no reference to the other, yet they were held part performance: *Walker* v. *Walker* (7). *Gunter* v. *Halsey* (8) (mainly relied on by the respondent) was decided in 1739 by Lord Hardwicke, and *Walker* v. *Walker* (7) in 1740. The acts done must have been to the prejudice of the doer. In *Lacon* v. *Mertins* (9) (decided 1743) payment of money was held part performance.

The House took time for consideration.

June 4. EARL OF SELBORNE L.C.:—

My Lords, the appellant in this case lived for many years, as housekeeper, in the service of Thomas Alderson, who died on the 16th of December 1877. She originally entered his service in

(1) 1 D. & J. 34.
(2) 3 Giff. 592.
(3) 12 Cl. & F. 45.
(4) 1 Vern. 48; 2 Vent. 353.
(5) 4 Russ. 318.
(6) 1 Cl. & F. 611.
(7) 2 Atk. 98.
(8) Ambl. 586.
(9) 3 Atk. 1.

1845, and having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about £137 per annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant (subject to a small annuity) a life interest in this estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The appellant having possessed herself of the title deeds, the heir-at-law, to whom the estate descended, brought the present action to recover them; and she by her statement of defence and counter-claim insisted that she was entitled to the same benefit which she would have taken under the will, if duly executed, by virtue of a parol agreement alleged to have been made with her by her master for sufficient consideration, and to have been on her part performed. I do not think it necessary to read the averments contained in the 3rd, 4th and 5th paragraphs of her pleading, because, so far as the facts are concerned, they must now be taken from the verdict of the jury, together with the Judge's notes of the evidence at the trial, if (as seems to have been assumed in both the Courts below) that evidence, as well as the verdict, may be regarded. Whether that assumption was correct or not is in my view immaterial, because in either view my own conclusion would be the same.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left by Mr. Justice Stephen to the jury, was "whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise, made by him to her, to make a will, leaving her a life estate in Moulton Manor Farm, if and when it became his property?" That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration other than the unattested will, which made no mention of any such

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inducement. I abstain from stating her evidence in detail, because, in the condensed form in which it appears upon the judge's notes, it certainly does not go beyond (if indeed it is sufficient to justify) the verdict. The material parts of it were to this effect:—That the appellant, having been long (as already stated) in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, in May, 1860, and so informed him. She had ten years before "begun to leave wages in his hand;" the arrear went on from that time, owing to his straitened circumstances; and, in May, 1860, £23 7*s.* 6*d.* remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to "make her all right" by leaving her the Moulton Manor Farm, which he promised to do if she lived with him. "And so therefore" (she said) "I took his advice, and I remained on by his promises;" (in another place, "I did not leave, because he advised me not"). She did not afterwards "press him" for wages; but, after his death, she brought an action against his administrator for them, which was dropped (as I understand) before or at the time when the present action was commenced. When he signed his will, he read it over to her and asked whether it was right, and "whether she was satisfied."

The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

It was admitted, in the argument at the bar, that the appellant had endeavoured to bring her case within the supposed authority of *Loffus* v. *Maw* (1), decided by Vice-Chancellor Stuart (under circumstances not dissimilar) on the doctrine of representation; for which purpose the Vice-Chancellor relied upon some expressions used by Lord Cottenham in *Hammersley* v. *De Biel* (2), and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and Lord Brougham for the later decision of this House in *Jorden* v. *Money* (3). Mr. Justice Stephen and the Court of Appeal (rightly in my opinion) took a different view. I have always understood it to have been decided in *Jorden* v. *Money* (3) that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts:—a distinction which is illustrated by such cases as *Prole* v. *Soady* (4), and *Piggott* v. *Stratton* (5). *Hammersley* v. *De Beil* (6) was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both of Lords Langdale and Cottenham in Chancery, and of Lord Campbell in the House of Lords (7). Those decisions are consistent with each other; *Hammersley* v. *De Biel* (6) does not justify, and *Jorden* v. *Money* (3), is irreconcilable with, the reasons stated by the Vice-Chancellor for his judgment in *Loffus* v. *Maw* (1).

Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it

(1) 3 Giff. 592. 8 Jur. N.S. 607.
(2) 12 Cl. & F. 45, at p. 62 n.
(3) 5 H. L. C. 185.
(4) 2 Giff. 1. 5 Jur. N.S. 1382.
(5) 1 D. F. & J. 33. 6 Jur. N.S. 129.
(6) 12 Cl. & F. 45.
(7) 12 Cl. & F. 63, 64 n. and 87; 3 Beav. 474–6.

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necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject (which are very numerous) have all, or nearly all, arisen under those words of the 4th section of the Statute of Frauds, which provide that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It has been recently decided by the Court of Appeal in *Britain* v. *Rossiter* (1) that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject matter than land; an opinion which seems to differ from that of Lord Cottenham (see *Hammersley* v. *De Biel* (2), and *Lassence* v. *Tierney* (3)). That equity has been stated by high authority to rest upon the principle of fraud: "Courts of Equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Lord Justice Cotton, in *Britain* v. *Rossiter* (4), that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance.

It has been determined at law (and, in this respect, there can be no difference between law and equity), that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced: *Crosby* v. *Wadsworth* (5); *Leroux* v. *Brown* (6); *Britain* v. *Rossiter* (7). *Crosby* v. *Wadsworth* (5) was an action of trespass brought by the purchaser against the vendor of a growing crop.

(1) 11 Q. B. D. 123.
(2) 12 Cl. & F. 64 n.
(3) 1 Mac. & G. 572.
(4) 11 Q. B. D. 130.
(5) 6 East, 602, 611.
(6) 12 C. B. 824.
(7) 11 Q. B. D. 123.

The contract was by parol, and it was held to be concerning an interest in land, within the 4th section of the statute. "But" (said Lord Ellenborough) "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof; which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol (so that, if the same had been executed, the parties could have treated it as a nullity), yet, being executory, and as for the non-performance of it no action could have been, by the provisions of the 4th section, maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it."

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his

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heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestæ subsequent to and arising out of the contract. So long as the connection of those res gestæ with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the res gestæ themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.

It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, "written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; *or those required by statute to be in writing.*" To constitute any such contract there must be a "final engagement;" and as a corollary to that rule a "locus penitentiæ" is given; i.e., "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape." But to this, "rei interventus raises a personal exception, which excludes the plea of locus penitentiæ. It is inferred from any proceedings, not

unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable:" Bell's Principles, ss. 18, 25, 26.

This must I think have been the principle on which the House of Lords proceeded in 1701 when it reversed the decree of Lord Somers in *Lester* v. *Foxcroft* (1). Lord Redesdale in *Clinan* v. *Cooke* (2) and *Bond* v. *Hopkins* (3) referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases before Lord Guilford—*Hollis* v. *Edwards* (4) and *Butcher* v. *Stapely* (5) decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds, in the earlier of which the Lord Keeper had refused, and in the latter had granted, relief. *Butcher* v. *Stapely* (5) was a strong case upon its circumstances; for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase-money under a signed agreement and having obtained a conveyance of the legal estate. Lord Guilford "declared that inasmuch as possession was delivered according to the agreement *he took the bargain to be executed.*"

Among later cases I may refer to *Pengall* v. *Ross* (6), decided by Lord Cowper in 1709; *Lockey* v. *Lockey* (7), by Lord Macclesfield in 1719; and *Potter* v. *Potter* (8), by Strange, Master of the Rolls, in 1750. "There must be something," said Lord Cowper (9), "more than a bare payment of money on the one part to induce the Court to decree a specific performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, &c.—in

(1) Colles Par. Cas. 108.
(2) 1 Sch. & Lef. 22.
(3) 1 Sch. & Lef. 433.
(4) 1 Vern. 159.
(5) 1 Vern. 363.
(6) 2 Eq. C. Ab. 46.
(7) Prec. Ch. 519.
(8) 1 Ves. Sen. 441.
(9) 2 Eq. C. Ab. 46.

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such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this Court from decreeing a performance of the other." Lord Macclesfield said (1) that an unwritten agreement "if executed on one part, had been always looked upon so far conclusive as to induce the Court to decree an execution on the other part, *not to destroy or avoid the agreement so far as it was already carried into execution.*" Sir John Strange (2) said, "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity."

The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some evidentia rei to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord Hardwicke in *Gunter* v. *Halsey* (3) said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement" ("the terms of which," he added, "must be certainly proved"). He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance: *Lacon* v. *Mertens* (4); *Owen* v. *Davies*, 1747 (5). This Lord Cowper in *Pengall* v. *Ross* (6), and Lord Macclesfield in *Seagood* v. *Meale* (7) had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken

(1) Prec. Ch. 519.
(2) 1 Ves. Sen. 441.
(3) Amb. 586.
(4) 3 Atk. 1.
(5) 1 Ves. Sen. 83.
(6) 2 Eq. C. Ab. 46.
(7) Prec. Ch. 561, A.D. 1721.

as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full: *Clinan* v. *Cooke* (1); *Hughes* v. *Morris* (2); *Britain* v. *Rossiter* (3). Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged: *Cooth* v. *Jackson* (4); *Frame* v. *Dawson* (5); *Morphett* v. *Jones* (6). "The acknowledged possession" (said Sir T. Plumer in *Morphett* v. *Jones* (6)) "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure."

"It is in general," said Sir James Wigram (*Dale* v. *Hamilton* (7)) of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract . . . . . But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not in general give relief": (see also *Britain* v.

(1) 1 Sch. & Lef. 40.
(2) 2 D. M. & G. 356.
(3) 11 Q. B. D. 123.
(4) 6 Ves. 38.
(5) 14 Ves. 386.
(6) 1 Sw. 181.
(7) 5 Hare, 381.

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Rossiter (1), per Lord Justice Cotton.) The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in 1. *Clerk* v. *Wright* (2) and *Whaley* v. *Bagenal* (3), where acts preparatory to the completion of a contract were held not to be part performance; 2. *Wills* v. *Stradling* (4), where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be enough "even to call for an answer;" 3. *Lamas* v. *Bayley* (5), where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have part of it when so bought at a proportionate price; but his "desisting from the prosecution of his purchase," was held to be no part performance; and 4. *O'Reilly* v. *Thompson* (6), where the agreement alleged was that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron Eyre saying, "These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract:" meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages,

(1) 11 Q. B. D. at p. 130.
(2) 1 Atk. 13.
(3) 1 Bro. P. C. 345.
(4) 3 Ves. 381.
(5) 2 Vern. 627.
(6) 2 Cox, 271.

was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas* v. *Bayley* (1). The alleged acts of part performance preceded, and therefore could not be evidence of, any contract on her part; their performance was (as in *O'Reilly* v. *Thompson* (2)) a condition precedent, without the fulfilment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant, as favourable to their argument, *Walker* v. *Walker* (3), and *Parker* v. *Smith* (4).

In *Walker* v. *Walker* (3) Lord Hardwicke did not execute any parol contract on the ground of part performance, or otherwise; all that he did was, to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A. and B., that A. would surrender a copyhold belonging to him to C., charged with annuities in favour of B., if B. would surrender another copyhold of his own to C. A. surrendered his copyhold accordingly, charged with the annuities, and died; B. did not surrender; but he sought nevertheless by his bill to enforce payment of the annuities against C. Lord Hardwicke dismissed the bill, saying, that "*he was not clear*" that the agreement might not have been established by cross bill, upon the principle of part performance. To such a dictum, not even the authority of so great a judge can give much weight. It does not appear how, if there had been a binding agreement, C., who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, viz., to relieve A.'s copyhold, in the hands of C., from the charge which B. unconscientiously sought to enforce.

Of the other case (*Parker* v. *Smith* (4), before Vice-Chancellor

(1) 2 Vern. 627.
(2) 2 Cox, 271.
(3) 2 Atk. 98.
(4) 1 Coll. 608.

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Knight Bruce), I think it enough to say, that it was dealt with in an extraordinary manner, and is difficult to reconcile with *Cooth* v. *Jackson* (1). The acts to which the Court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held, that there was an agreement duly signed according to the Statute of Frauds on the 30th of November, 1842; but the supposed acts of part performance were done before that time; and, until then, everything, as to the terms of the intended new lease, remained unsettled. I cannot, therefore, regard *Parker* v. *Smith* (2) as a satisfactory authority.

I am sorry for the appellant's disappointment, through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your Lordships were to reverse the order of the Court of Appeal. I should have been glad if that Court had dealt differently with the costs; as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal; and I humbly venture to recommend to your Lordships that it should be dismissed without costs.

LORD O'HAGAN:—

My Lords, I have had the advantage of perusing the opinion which has just been delivered by the Lord Chancellor; and it has dealt so exhaustively with the case and with all the authorities which bear upon it, that, concurring as I do with the conclusions of my noble and learned friend and the reasons on which they are grounded, I do not feel justified in occupying time by any lengthened repetition of them. I shall briefly indicate the grounds of my concurrence.

(1) 6 Ves. 38.

(2) 1 Coll. 608.

It seems to me impossible to hold that, without a dangerous extension of the principles on which the operation of the Statute of Frauds has been held to be avoided as to certain parol contracts, on the ground of part performance, your Lordships can refuse to affirm the unanimous judgment of the Court of Appeal.

There have been, I think, two errors in the conduct of the case, which have created difficulty and contradiction in the decision of it.

In the first place, the reliance of the plaintiff on the ruling of the Vice-Chancellor in *Loffus* v. *Maw* (1), and the consequent effort to shape the evidence so as to make that ruling applicable, tended to raise a false issue, and place her controversy on an untenable foundation. I quite agree that the authorities on which that ruling was based do not sufficiently sustain it. This case must be dealt with not on the ground of representation, but as one of contract, having relation to some binding engagement for future conduct, and not to a responsibility created by any misleading averment of existing facts. The result of the argument has made the mistake apparent, and it is now confessed.

Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract, partly performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked, from the findings of the jury and the testimony supporting them, to say there was a contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained. Too much attention was bestowed upon the proof of the contract and too little on the sufficiency of the performance, which was the more substantial part of the burden on the appellant in supporting her claim. The alleged agreement regarded an interest in lands and the statute nullified it for the purpose of the action. *Per se*, it was of no account and could have no value given to it unless, in the first instance, it was evidenced by acts to be accounted for only

(1) 3 Giff. 592. 8 Jur N.S. 607
3 2 L 2

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on the supposition of its existence. The allegation of it could not be made the subject of judicial consideration as founding any right of suit, in the absence of such acts, satisfactorily ascertained.

In this case, the learned judge who presided at the trial, and the judges of the Court of Appeal seem all to have thought that an unwritten contract capable of execution by a Court of Equity, on the fulfilment of the proper conditions, was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the bar, on the one side and the other. For my own part, I have some hesitation in holding upon it with the appellant from the want of definiteness in the supposed arrangement and the obscurity of the proof as to some of its material elements. If at any time, as I conceive,—consistently with the proved agreement,—during the life of Thomas Alderson he might, at his will, have dismissed the appellant from his service, and if she reciprocally might have declined to serve him further and so have prevented the fulfilment of the alleged condition of his promise, which could only have had effect on the continuance of her service until he died, and if, as the Lord Chancellor has, in my opinion, correctly stated, there is no evidence to shew that she agreed to serve without the wages which she claimed and sued for after her master's death, I do not see that a bargain so obscure in its terms, so uncertain in its effect, and so doubtful in its intention, could have been properly enforced. I do not see that we have before us that "certain proof" of the agreement which the authorities appear to require.

But I do not deem it necessary to discuss further the grounds of the view adopted by the learned judge. The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached. "The principle of the cases is," says Sir William Grant, "that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to shew what the agreement is." (1) Then, but not till then.

I confess I have found it hard to follow the reasoning of the

(1) *Frame* v. *Dawson*, 14 Ves. 387, 8.

judges in some of the cases to which the Lord Chancellor has referred—to reconcile the rulings, in others of them—and to regard as entirely satisfactory the state of the law in which the taking of possession or receipt of rent is dealt with as an act of part performance, and the giving and acceptance of any amount of purchase-money, confessedly in pursuance and affirmance of a contract of sale, is not. As to some of the judgments, prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with the present Master of the Rolls in *Britain* v. *Rossiter* (1), when he called them "bold decisions."

But there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words (2), "as could be done with no other view or design than to perform that agreement." It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

The appellant's case fails in the fulfilment of this indispensable condition. It seems impossible to say, that the mere statement of the acts on which she insists of necessity implies the existence of the agreement which she is bound to establish. Those acts are manifestly capable of an explanation in no degree involving the assumption that such an agreement ever was made. Briefly summarised in the way suggested by Sir William Grant, and most favourably for the appellant's contention, they may be taken to represent her service in Alderson's house, her abandonment of a purpose, as she describes it, of "making a home of my own," and her continuance to serve from 1860 until the death of her master, without the wages she had theretofore claimed and partially received.

But, though her long service is consistent with her present case, it is not demonstrative of any contract to give her the life estate

(1) 11 Q. B. D. at p. 129. (2) Amb. 587.

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she claims. She might unquestionably have remained with her master, in the enjoyment of some present comforts and the expectation of some future provision, though no such contract had been ever dreamt of. There have not been wanting recorded cases in which time and care have been bestowed by one person upon another, even from a vague anticipation that the affection and gratitude so created would, in the long run, ensure some indefinite reward. And legal tribunals have refused in those cases to turn courtesy into contract and compel any payment although such service had been performed. In such circumstances, and even where there may have been a general undertaking to afford a suitable acknowledgment, there would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might be the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract.

Then, as to her service without wages, I repeat that there is no proof of any engagement so to serve, or anything to shew that she might not have demanded and recovered them, at any time, in a Court of law. But, even if the appellant had made such an engagement, she might have done so from motives and with hopes such as those I have indicated, or others of a like kind, strong enough and persuasive enough to induce her, for the time, to labour gratuitously and without any agreement to give her in return an interest in land. The fact that her master designed and strove to give her such an interest, at the close of his life, cannot be taken to establish the existence of such an agreement a dozen years before.

As to her continuance in a state of celibacy the evidence does not shew that she ever had a real purpose to abandon it. She only "thought of" "making a home;" and that she failed to make it may have been attributable to very many reasons, having no relation whatever to the contract on which she would now rely. She may have taken other views of life, or found such a connection as she had "thought of" undesirable or impossible. Her case does not appear to me to be helped by the suggestion that, at one period, she contemplated an arrangement of the kind.

I have come, very reluctantly, to the conclusion that the judgment of the Court of Appeal was right and that the appeal must be dismissed.

LORD BLACKBURN :—

My Lords, I have great difficulty in understanding how Mr. Justice Stephen came to the conclusion that there was a contract between Thomas Alderson and the defendant to the effect alleged. It seems to me impossible to say that the jury found that there was such a contract by their answer to the question asked.

I do not think that the course taken at the trial amounted to a reservation to the Judge of power to draw inferences of fact from the evidence, and if it had amounted to such a reservation I do not think that the evidence appearing on the notes would have justified such a finding. It is not merely that the sole witness is a person deeply interested, giving testimony as to what took place between herself and a person deceased, and that no judge sitting in equity and deciding both the law and fact would have acted on such evidence without confirmation; and that the causing of a draft will to be prepared in 1872 in favour of the defendant, cannot be considered as confirmation of a promise alleged to have been made at least twelve years earlier. I do not think there is any rule of law which prevents such unconfirmed evidence from being admissible, or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly pointed out to them how dangerous it would be to do so. The risk of a jury coming to such a decision, and the consequent practical change in the doctrine of specific performance, is one of those which the Legislature, in amalgamating law and equity, did not perhaps sufficiently provide for.

But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favour of the defendant could have stood, though perhaps it might have been necessary to have a new trial. I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not

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denied that there was no note or memorandum of the contract signed by Thomas Alderson.

And I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed, though I speak with diffidence, as I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject.

I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction. It was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. Sales by auction and sales negotiated through brokers were by some thought, for this reason, not to be within the statute. Lord Mansfield intimates such an opinion in *Simon* v. *Motivos* (1). I do not think it can be said to have been finally settled that such sales were within the statute till *Schofield* v. *Kenworthy* (2), as late as 1824. And there are indications that great equity judges on a similar principle thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was. I so understand some of Lord Hardwicke's remarks in *Gunter* v. *Halsey* (3) and *Lacon* v. *Mertins* (4). This principle would apply whether the unequivocal act was a giving possession of the land or paying the price in whole or in part.

As soon as it was established that the construction of the statute was not what had been supposed, and that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged or otherwise unexceptionally proved, I think this class

(1) 1 W. Bl. 599.
(2) 2 B. & C. 945.
(3) Amb. 586.
(4) 3 Atk. 1.

of cases ought to have been considered overruled, but though I speak with diffidence as to the effect of decisions in equity it seems to me that to some extent at least they were not. Those which tended to shew that payment in whole or in part would take the case out of the statute are overruled by the authorities cited by the Lord Chancellor, but there are cases that for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is I think in effect to construe the 4th section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was res integra in refusing to interpolate such words, or put such a construction on the statute. But it is not res integra and I think that the cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now I think communis error and so makes the law.

There are many rules laid down as to what should guide a judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a Court which has the facts found by a jury, in applying these to a trial by jury, but that is a question not raised now. But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession.

The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case, I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party. The moral justice of the case was completely with the appellant in *Lester* v. *Foxcroft* (1), and as that case was decided more than

(1) Colles, Par. C. 108.

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180 years ago by this House it is too late now to inquire whether the decision there overruled was not more consistent with technical equity. If there was proof of the allegation that the heir-at-law kept back the deeds from the dying man when he wished to execute them, it would seem that the reversal was quite right. Lord Redesdale doubts whether the cases founded on it have been as well considered (1).

But the cases where this is given as the ground of decision are all cases in which there has been a change of possession, and I do not think that, as far as they are anomalous, they should be extended to a case where there has not been such a change. I do not doubt that, without any such change, actual fraud might give a ground for equitable relief. But Alderson, whether he only held out hopes that he would make a will in the defendant's favour, or actually contracted so to make his will, did mean to make it. There can be no fraud on his part, therefore, unless it is said that in equity it amounts to fraud not to complete a contract when the consideration is one that cannot be restored or compensated for. But this would go a great deal too far. Where a parol promise is in consideration of marriage, and the marriage actually takes place, the consideration can neither be restored nor compensated for; when a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle would render the statute a nullity, and it has been decided in *Britain* v. *Rossiter* (2), that this principle does not apply to contracts not to be performed within a year. And it would, I think, be a strange construction to apply this principle to one of the four cases in the same section of the statute where it cannot be applied to the three others. It has never been done, and it is impossible not to see that if there is any case in which the policy of the Statute of Frauds clearly applies, it is such a case as this, where the promise set up is one not to come into force till after the death of the person who is alleged to have made it.

(1) *Bond* v. *Hopkins*, 1 Sch. & Lef. 433, 4.
(2) 11 Q. B. D. 123.

I have therefore come to the conclusion that the judgment below should be affirmed. The costs are entirely in the discretion of this House. I do not myself see any sufficient reason for departing from the usual rule as to costs; but if the rest of your Lordships are of a different opinion I will not contest the point.

LORD FITZGERALD:—

My Lords, I entirely concur in the judgment pronounced by the Lord Chancellor, affirming the judgment of the Court of Appeal.

The decision of your Lordships' House is to rest on the ground that there was nothing in the case to take the supposed agreement out of the operation of the 4th section of the Statute of Frauds. I have had the advantage of reading the judgment of the Lord Chancellor on this question, and I adopt his reasons. The Lord Chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their own nature referable to some such agreement as that alleged, and I may add must necessarily relate to and affect the land the subject of that agreement. I quite agree that the doctrine, whatever may have been its foundation, has been too long established to be now questioned. We are bound to follow, but should rather confine than enlarge its limits. There was no part performance in the case before us such as has been defined as necessary, and I may add that the peculiar character of the alleged agreement does not admit of such a part performance by the defendant as could affect the operation of the statute.

If there was such an agreement as the defendant alleges, she had done all that was to be performed on her part, that is to say, she remained in the service of Alderson up to the time of his death, and there is no proof that she received any wages or was paid the arrears due to her in 1860. Mr. Justice Stephen thus deals with this part of the case: "As it was a contract relating to land it obviously falls within the 4th section of the Statute of Frauds. But as it is obvious that it was completely performed on the part of the defendant, it is equally clear that according to the well-known doctrine of equity the application of the statute

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is barred." But it is equally obvious that the acts of the defendant had no necessary reference to any contract such as is relied on, or indeed to any contract whatever, or to the land, and would be properly accounted for by some expectation of bounty from her master. At an early stage of the discussion I had satisfied my mind that there never had been any such agreement as that relied on, and that the jury did not find that there had been any such agreement.

The case made by the defendant at the trial would not probably have lasted many moments had it not been for the document called the will, which was supposed to afford confirmation of the defendant's story, but is not such in reality. There is not to be found in it any allusion to any agreement or promise or representation, nor is the intended devise for her benefit said to be as a reward for her services; and whilst she alleges a promise to leave her the manor farm, the will gives her a life estate in it, and in all other the intended testator's real estate and in all his personal estate. The intended will does indicate a desire to benefit the defendant very largely, but contains not a word that is referable to such an agreement as is alleged.

The agreement relied on by the defendant in her defence is thus put forward in the 3rd paragraph of her defence, "and it being inconvenient to him, or he being unable to pay the said arrears of her said wages, he, in order to induce her to continue so to serve him, proposed to the defendant, and represented to her that if she would not press him for payment of her wages, and would continue to serve him and remain with him whilst he lived, he would leave her a life estate in the property which he expected his uncle would leave him, and in any property of which he might die possessed;" and in the 4th paragraph, "that it was agreed between the said Thomas Alderson and the defendant, that in consideration of the defendant remaining and continuing so to serve him during his life, and of the defendant forbearing to press him for payment of the said arrears, and in lieu of wages for the future, the said Thomas Alderson would by his will leave to the defendant a life estate in his property to take effect at his death, and that he would duly secure to her the said life estate." It is obvious that these two paragraphs were taken from the

dispositions found in the intended will, and that there was no evidence to sustain either; but without intending to confine the defendant to the technical statement put forward by the pleader, and giving her the full benefit of her evidence, and of the verdict of the jury, it seems to me that the correct view is that although Alderson probably made representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so.

I concur in the observations which have been made in the course of the case as to the inexpediency of giving effect to an agreement of the character in question, alleged by the defendant to have been verbally entered into over twenty years since, not binding on her, and not to come into effect, so far as Alderson was concerned, until after his death, and resting on the unaided testimony of the defendant. If an instance was wanted to justify the wise provisions of the Statute of Frauds and of the Wills Act we find it in the case now before us.

On the question of costs I confess that I have some difficulty. My view at the commencement was that the costs should follow the event; but on reflection, considering that the defendant succeeded in obtaining the judgment in the primary Court, and that she has lost everything, not only the intended provision made for her by the imperfect will, and the benefits conferred upon her by it, but also her wages; and further, taking into account that the Court of Appeal has, in the exercise of its discretion, with which we cannot interfere, given against her the costs in the primary Court and in the Court of Appeal, I think that here we may, under these circumstances, exercise our discretion in favour of the defendant in the manner indicated by my noble and learned friend the Lord Chancellor.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals 4th June 1883.

Solicitors for appellant: *Harvey, Oliver & Capron*, for *J. Proud*, Bishop Auckland.

Solicitors for respondent: *Ridsdale & Son*, for *W. W. & W. J. Watson*, Barnard Castle.

[HOUSE OF LORDS.]

H. L. (E.) 1883 April 24.

THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER . . . . } Appellants;

AND

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF ROCHDALE . . . . . } Respondents.

Highway, Repair of — Turnpike Roads ceasing to be such and becoming Main Roads—Highways and Locomotives (Amendment) Act 1878 (41 & 42 *Vict. c.* 77) *s.* 13.

Post 786-7 789

The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) by sect. 13 enacts that any road which has "between the 31st of December 1870 and the date of this Act ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate."

The corporation of the borough of Rochdale was the highway authority of the Rochdale highway area. Under sects. 47–50 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) the obligation to repair all public highways within the area of the "town" was imposed upon the corporation, and the turnpike trustees were forbidden to collect any toll or lay out any money on any road within that area. By a local Act in 1872 the boundaries of the borough were enlarged and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that further portions of turnpike roads were for the first time brought within the area of the borough and within the operation of the Towns Improvement Clauses Act 1847:—

Held, reversing the decision of the Court of Appeal, that these further portions, being only parts of turnpike roads, had not "ceased to be turnpike roads" and were not to be deemed to be "main roads" within sect. 13 of the Highways and Locomotives (Amendment) Act 1878; and that the county authority were not liable to pay half the expenses of their maintenance.

APPEAL by the defendants from a judgment of the Court of Appeal (Lord Coleridge C.J. Brett and Cotton L.JJ.) (1) which

(1) 8 Q. B. D. 12.

reversed a judgment of the Queen's Bench Division (Williams and Mathew JJ.) in favour of the defendants (1).

The action was brought by the respondents as the highway authority against the appellants as the county authority, under the Highways and Locomotives (Amendment) Act 1878 s. 13, to recover half the expenses incurred by the respondents in the maintenance of certain roads.

The facts are fully set out in the reports of the decisions below. The statement in the head-note is sufficient for the purposes of this report.

April 23, 24. *Gorst* Q.C. and *H. F. Blair* for the appellants:—

The question turns on sect. 13 of the Highways and Locomotives (Amendment) Act 1878, and is whether the words "a turnpike road" mean a whole road subject to a turnpike trust, or a part of such road. Sect. 14 defines the highway area. In sect. 13 "any road" means the whole of any road: if not, much of the statute is unnecessary or superfluous: e.g. "as to every part thereof &c." By sect. 38 "county" has the same meaning as in the Highways Act 1862 (25 & 26 Vict. c. 61) s. 2. To make the appellants liable the road must be "situate in a county," but this road is not situate in the county of Lancaster, nor in any county, because it is situate in a borough, and by implication from sect. 2 of the Highway Act 1862 a borough does not form part of the county in which it is. The words "cease to be a turnpike road" in turnpike Acts mean always the expiration of the trust. Sect. 27 of the Highways and Locomotives (Amendment) Act 1878 speaks of a "disturnpiked road." The whole of these roads have not ceased to be turnpike roads: and though these parts have, sect. 13 does not apply to parts of roads which have been disturnpiked.

Sir H. Giffard Q.C. and *Crump* for the respondents contended that the decision of the Court of Appeal was right for the reasons there given (2), and referred to the Public Health Act 1875 (38 & 39 Vict. c. 55) ss. 144–148, 216.

Gorst Q.C. replied.

(1) 6 Q. B. D. 525. (2) 8 Q. B. D. 12.

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LORD BLACKBURN:—

My Lords, this case depends upon the construction of a few words in an Act of Parliament, and the words of that Act of Parliament are such as to make it no easy matter to say what the Legislature intended. The general rule of construction of Acts of Parliament is of course, as every one knows, that we are to give effect to what we understand to be the intention of the Legislature; and we are to derive the intention of the Legislature from the words which they have used, construing them in the sense which such words ought to bear with reference to the subject-matter to which they are applied. That is a very good rule to lay down, but the difficulty always is as to the application of it to the particular case. Now as to this particular case what appears to me is this. I think that the fact that Rochdale has a municipal corporation is purely an accident, and that it has nothing to do with the case which we have to consider. But the fact that Rochdale has now an urban sanitary authority within the Public Health Act of 1875 has a great deal to do with the matter, although the fact that it is a municipal borough is not, in my opinion, important.

Now the first thing which we find is this. Looking at the history of the legislation, in 1853 before Rochdale was ever made into a borough but when it was only a country town, a Rochdale Improvement Act was passed, which incorporated some clauses of the Towns Improvement Act 1847, and particularly sect. 50, "The trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act or lay out any money thereon." The limits of that special Act are three quarters of a mile round the market place of Rochdale, which, as I said before, was not at that time a borough. Then in 1856 Rochdale was incorporated and became a borough, and in consequence of that the powers which had previously been exercised by the Commissioners under the Rochdale Improvement Act all came into the hands of the town council of the borough, who were then acting as trustees. Then followed the Rochdale Improvement Act 1872—it is important to notice the date, 1872. That Act extended the territorial limits of the municipal borough and made them co-extensive with the boundaries of the parlia-

mentary borough of Rochdale, which were a different thing; and all the provisions of the Acts theretofore in force relating to the "town" were extended to and rendered applicable in respect of the enlarged borough. Now this portion of the enlarged borough comprises a portion of a district which was not within the jurisdiction of the Improvement Commissioners, or the jurisdiction of the municipal corporation when they were acting as trustees, until that Act had obtained the royal assent, and the Act obtained the royal assent in 1872, not quite seven years before the Act of 1878 which we have to consider. There were several portions of turnpike roads which were within that extended district, as I may call it, the trusts of some of which had expired and some had not expired at the time when this action was brought.

That being the state of things in 1872, in 1875 there came the Public Health Act of that year. That Public Health Act regulated what should be done in urban sanitary districts; and amongst others these are the clauses which are material. Within an urban sanitary district (which would include Rochdale, for Rochdale would be a borough whose corporation was exercising the powers of an urban sanitary authority) it is enacted that the municipal authority shall be the sole surveyor of the highways; and there is a clause (sect. 148) which clearly shews that the Legislature, in passing that Act of 1875, were quite aware that within an urban sanitary district or through an urban sanitary district there might be turnpike trusts, and they made provision as to what should be done with them. The turnpike trusts were to continue, but arrangements and agreements might be made as to that portion of road which was subject to a turnpike trust wholly within the district of the urban authority, and that it might be managed by them. Of course, when such an Improvement Act as the present had passed, including sect. 50 of the Towns Improvement Act, the portion of the turnpike road which lay within the district that had been created under such Act was no longer to be managed by the turnpike trustees; but by the general law of the land the portion of highway which lay within the parish was repairable by that parish. The section which has been referred to of the Public Health Act shews that

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as a general matter the Legislature were quite aware that there might be turnpike roads running in urban sanitary districts.

That being the state of things, there came the legislation of 1878, which has to be considered. The legislation of 1878 as regards all this matter, seems to have one general idea in it. The portion of road wholly within the parish was, by the general law of the land, repairable by that parish. It was a great hardship, or might be a great hardship, for that particular parish, which was perhaps a poor rural one, that the parish should have to keep up a road which was cut up by the traffic of distant parts of the country that came across it. That was a practical inconvenience which had been felt long before; and I believe it was mainly upon that ground that Acts for turnpike trusts were first introduced. Now Turnpike Acts were almost always passed for a certain time, but in practice they were continued for a longer time—they varied in their terms, but that was the common thing.

The Legislature, seeing that what I have just stated was the case, seem to have thought that where there was a road which ran through a parish, or where there was a highway authority which had to maintain the road, that highway authority being substituted for the parish, it might be very hard upon it that a comparatively small district should maintain the road entirely for the benefit of the great traffic which passed through it and which came from distant parts; and I think that that was a sensible and intelligible reason for legislation. The mode in which the Legislature sought to remedy that hardship was to say that when there was such a road it should be a main road, and that the main road should still be maintained by the district in which it was, but that half of the expense was to be paid out of the county rate of the county in which it lay. They seem to have thought that when such a road had been put under a turnpike trust, primâ facie that road was in its nature such as ought to be maintained in this manner; and it was certainly a reasonable enough thing so to think. Accordingly they passed the enactment which we have now to construe (sect. 13 of the Highways and Lomotives (Amendment) Act 1878), and as to which it is no doubt very difficult to see what it means. "For the purposes of this Act, and subject to its provisions, any road which has

within the period between the 31st day of December 1870 and the date of the passing of this Act ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road." I pass by the rest of it. What do these words mean? If they mean any road which was subject to a turnpike trust (meaning the whole road which was subject to a turnpike trust), and has ceased to be a turnpike road (meaning that the Turnpike Act has either been repealed or by efflux of time has expired), then the present case is not within them; for these portions of the turnpike roads which lie within the extended borough of Rochdale are not within these words, and consequently the action was wrongly brought, and the judgment in the action ought to be for the defendants. That was the view which the Queen's Bench Division took—they thought that that was the meaning of these words. The Court of Appeal thought that any road has ceased to be a turnpike road when by legislation, though the rest of the road has continued to be a turnpike road, a portion of the road which had been subject to a turnpike trust has been taken from it and the turnpike trustees have been forbidden either to spend money upon it or to interfere with it or to levy tolls upon it. When that had been done, the Court of Appeal thought that it had ceased to be a turnpike road, and as by the operation of the Act of 1872 these had, in that sense of the word, ceased to be turnpike roads within the seven years, the time limited, they thought that the plaintiffs were entitled to recover.

The question now is, which of the two constructions of the Act is the right one. I do not myself attribute any weight whatever to the interpretation clause. My own impression is, looking at these words, that if the case had been now beginning I should have hesitated long before saying what the words of the Legislature did mean. I do not think that it is at all a good specimen of draftsmanship—the words are by no means clear; I, however, rather think (but on this I wish to speak with some doubt) that if it had been absolutely res integra I should have inclined to the same opinion as the Queen's Bench Division did, I should have thought that the effect of the enactment was that it meant

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when the whole turnpike trust ceased. But the Court of Appeal having decided the other way, I rather think that if I were left deciding by myself alone I should say that although I was inclined to agree with the Queen's Bench Division, yet I did not feel that so strongly as to make me reverse the decision of the Court of Appeal. But I find that the other noble and learned Lords who have heard the case have a much stronger opinion in favour of the view of the Queen's Bench Division than I have, and I certainly should not differ from them in the state of mind which I have described. I think that the strongest reason why the words which have been used in this legislation may bear the meaning which the Court of Appeal has put upon them, is found in what Sir Hardinge Giffard brought forward, namely, that in the Towns Improvement Clauses Act, which is a general Act, sect. 50 certainly does use the words "any road" in such a sense as shews that they clearly mean a part of a road; for it says that the turnpike trustees shall not spend money on any road or levy tolls on any road which lies within the district of the special Act, which clearly means any portion of a road that lies within that district.

Now the Legislature in passing sect. 13 of the Act of 1878 knew or ought to have known (perhaps they forgot it) that there were a great many districts in England in which Acts had been passed including sect. 50 of the Towns Improvements Act as part of them; and knowing that, when they used the words at the beginning of sect. 13 "any road" (the very words of sect. 50) there is a primâ facie reason for saying that they used them in the sense in which the words had been used in the legislation which they were dealing with or ought to have been dealing with. They used those words no doubt, but then it may very well be said that it does not at all follow that words which are used in one Act by the Legislature shall have the same sense as when they are used in another Act. It is only when the two subject-matters are so closely connected that you can fairly say that the Legislature must have used the words in the same sense as they had done before, that the argument comes into play at all.

What I have said makes me pause before I venture to assert that the Court of Appeal were wrong. But when I look at the

matter in the other way and see what good ground there is for saying that having regard to the object of the Legislature it would perhaps be reasonable to consider that the whole turnpike trust was then before the Legislature, I will not venture to differ from the other noble and learned Lords who have heard the arguments in the present case and to say that the Court of Appeal were right.

Taking that view of the matter the result will be, and I beg to move, that the appeal be allowed with costs.

LORD BRAMWELL :—

My Lords, I concur in the advice which has been given to your Lordships by my noble and learned friend, and I confess that my opinion upon the matter is so strong that when I consider who have decided the other way in the Court of Appeal, and the hesitation of my noble and learned friend, I have some misgiving as to whether I can properly have appreciated the conderations upon which the Court below have acted and my noble and learned friend has doubted.

I do not know historically how this Act came into existence. It may have been, as Mr. Gorst says it was, I have very little doubt that it was so, from some notion of relieving agricultural districts in the way he supposes. However I doubt very much whether, if one did know, one would have a right to apply that knowledge to the construction of this Act of Parliament. I think not. I think you must construe the Act of Parliament, not according to what possibly may have been the motives, if you can ascertain them, of those who passed it, but according to its language. I think upon the language of the Act of Parliament you can see what the intention was, namely, that whereas certain turnpike roads were maintained by the tolls which the turnpike trustees could levy, it was contemplated, as we know (and this we have a right to refer to, because it is general knowledge) that this power of levying tolls would cease by the expiration of the time for which the power to levy them had been given, and that, as a consequence of that, parishes which had no particular benefit from the road, any more than they had from other roads in the parish, would be liable to expenses for repairs occasioned

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by the use of those roads by persons out of the parish, by the general public in fact; I say, taking those things into account, it seems to me that one can see that the Legislature intended to give a relief to parishes which would find themselves in the position of having to repair such roads as those, that is to say, roads which had ceased to be turnpike roads by reason of the expiration of the time within which the power of levying tolls could be exercised. It seems to me that the intention of the Legislature was to give relief to parishes in such cases as that—possibly to sanitary authorities, but I think not, for I do not see that it would apply to sanitary authorities—at all events we may say generally to give relief to the parishes through which the roads passed. I think one can see that that was the general intention.

Now let us see how that intention has been carried into effect by sect. 13 of that Act. I own to my mind the language of that section is plain. "For the purposes of this Act and subject to its provisions any road which has" (I will leave out the next words) "ceased to be a turnpike road and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such." To my mind those words plainly mean this, that when any turnpike road, or any road which was a turnpike road, has ceased to be such, or if any road which being a turnpike road (as indeed it says in so many words) shall cease to be such after the passing of this Act, then upon the turnpike road spoken of there ceasing to be a turnpike road, the provisions of this section shall apply. I see no difficulty in understanding that to mean, not a road from the Land's End to John o' Groats, but a road which was under a turnpike trust, and which may be five miles in length or fifty for all I know, and which may go through one parish, or parts of one parish, or one county, or may go into two or three. The expression to my mind is one which one ordinarily uses when one says "This is a turnpike road," that is to say, the particular place we are standing upon is a part of a road, which road is under a turnpike trust, or has the powers and duties and rights and circumstances which attend a road under a turnpike trust.

It seems to me manifest that that is so, not only from the

reason of the thing, but when you come to the words, "and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such." That says in words "any road which being at the time of the passing of this Act a turnpike road." But part of a turnpike road is not "a turnpike road;" it is part of a turnpike road. And if after the passing of this Act the turnpike powers expired as to any road it would not be true that a part of the road in particular had ceased to be a turnpike road; it would be true of the whole road. If after the passing of the Act a particular part of the road were taken out of the operation of the turnpike trusts it would not be true that the turnpike road had ceased to be a turnpike road: it would only be true that a part of it had. I confess this appears to me to be plain.

In addition to that I think the expression "cease to be a turnpike road" (I do not want to repeat the arguments that have been used) is an inaccurate expression to apply to a case where a portion of a road has been taken away from the operation of a turnpike Act. It really is like the case that Mr. Blair put, of a man's hat being knocked off his head, and of a person saying "You have ceased to wear your hat." In one sense it would be true; you could not say it was a falsity, but it would be a very inaccurate way of describing what had happened. The word "ceased" is a strictly proper word to apply to the case where the entire road has "ceased to be" a turnpike road because the powers applicable to the entire road have ceased, but it is an inaccurate expression to describe what has happened to a part of a road which has been taken out of the road generally, and which has in one sense ceased to be a turnpike road, because it has ceased to be a part of a road which is a turnpike road.

Therefore if we look at the general intention of the statute, which I think can very well be collected from it, and look also at the language used, it is manifest to my mind that this 13th section must be read thus: "For the purposes of this Act and subject to its provisions any road which has been a turnpike road" (that is to say the entirety of the road which has been a turnpike road) "and at the date of the passing of this Act has ceased to be such, and any turnpike road which is a turnpike

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road at the time of the passing of this Act and afterwards ceases to be such;" the provisions of the section shall apply to—I say that is a matter of mere construction.

But further than that, really when one considers what the condition of things is here, as was most forcibly put by my noble and learned friend on my left (Lord FitzGerald), how is it conceivable that the Legislature could have intended that at the expiration of six years this burden which the corporation of Rochdale had voluntarily taken upon themselves (advisedly no doubt, and for good consideration,—because they found it worth their while to do so) should be taken from them and shifted in part upon the county? Sir Hardinge Giffard very ingeniously suggested that possibly they had not taken it upon themselves, and he gave an illustration which was perhaps somewhat difficult to answer (1); but everybody knows perfectly well that towns do take this upon themselves, and that it is not legislation that has forced it upon them. They do it voluntarily, and no reason can be given, as I say, why it should be taken from them and put upon the county.

In addition to that there is this consideration. I have been endeavouring to find a power in the local Acts which I cannot find altogether there, though I think there is some indication of it—probably it is derived from the provisions of the general Acts incorporated with these local Acts—a power enabling this corporation of Rochdale to deal with this road in an entirely different way from that in which rural parishes, or indeed urban parishes, can deal with the roads within their boundaries which cease to be turnpike roads but which do not come under any of these Improvement Acts. I have not the slightest doubt in the world that it can be found out that the corporation of Rochdale may divert the road, and may widen the road, and may deal with it in a way altogether different from the way in which a road is commonly dealt with by a parish, which has to repair it after it ceases to be a turnpike road.

(1) The illustration was this:—Suppose the Bill now threatening the Corporation of London and proposing (inter alia) to enlarge their jurisdiction became law. Years hence it might be erroneously said the corporation must have proposed or assented to it, for otherwise it would not have passed.

I confess I cannot feel any difficulty about this case. It may be from my inability to appreciate the point which has created a doubt in the mind of my noble and learned friend who has addressed your Lordships, and which has caused the Court of Appeal to decide otherwise, but speaking for myself I really cannot entertain any doubt about it. I think that the judgment of the Court of Appeal must be reversed.

LORD FITZGERALD :—

My Lords, I agree with the opinion of the noble and learned Lord who has preceded me, and I should say that from the beginning I thought on reading the two judgments—the judgment of the Queen's Bench Division and the judgment of the Court of Appeal—that on the whole it would be better to follow the judgment of the Queen's Bench Division. In that judgment, as delivered by Williams J., I think a construction is put upon sect. 13 of the Act of 1878 which follows its grammatical and ordinary meaning, which adds nothing to it, and takes nothing from it, and, above all it will be observed, does violence to no existing right and does not affect existing liabilities. When you find a grammatical construction of which that can be said, it is preferable in most cases to follow it. I should not say that I have a very confident opinion, because, as I have confessed in the course of the argument, questions arising upon the Turnpike Road Acts or Highway Acts as applicable to England are entirely new to me, and I am especially glad that in this particular case I am relieved from the task of following out that labyrinth of Acts which we should have to deal with, if we had to take them as bearing one upon the other, for the purpose of interpreting sect. 13.

I deal with sect. 13 of the Act of 1878 alone. No doubt it is capable of two meanings. One meaning—that which I am prepared to adopt—was given to it by the Queen's Bench Division. Now let us see how the contrary meaning would operate. Certainly the section is capable of being construed as applicable to part of a road as well as to the whole of the road which is subject to some particular turnpike trust; but in dealing with it as the Court of Appeal have done, you involve yourself at once in

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Lord FitzGerald.

difficulties. You interfere with existing liabilities, and you create rights which did not exist before the Act passed. I have already pointed this out in the course of the argument; it has become of importance as affecting, not the borough of Rochdale alone, but also many boroughs throughout the country. There must be, and I assume that there are, a great many boroughs in different counties in exactly similar circumstances, that is, boroughs which have taken upon themselves the maintenance of the roads within the territorial ambit of the borough, getting, in return, complete control over them, a property in them and a right to do with them as they please, save that they are under an obligation to keep them in repair; and they may raise special rates within the limits of the borough for that purpose. In addition to the full dominion, they get an ample equivalent for the expenses of maintenance in being protected, by the provisions of the Act, from contribution to other county rates in reference to roads situate in the district of the county to which the borough belongs. It has been observed that before the passing of the Act of 1878 the position of the borough of Rochdale since 1872 was unaltered. I dare say that observation would apply to other boroughs in the country. They had certain liabilities, and they had no right to reduce those liabilities by going to the county at large. We all know that, as was pointed out by the noble and learned Lord who has last delivered judgment, when a road becomes a portion of a borough such as Rochdale, the whole state of things is altered, and the repairs of the road become quite a different thing. Probably in place of being an ordinary country road it becomes one paved and with footpaths. The expense of keeping it in repair may be double what it was before, and if we are to adopt the construction put upon sect. 13 by the Court of Appeal the result would be that one-half the cost of repair of such of these roads as had formerly belonged to turnpike trustees would be thrown upon the county at large. I asked if there was anything in the language of the Act of Parliament which would warrant us in coming to that conclusion, or if there was any reason that could be adduced from the special nature of the matters dealt with by the Legislature to lead us to that conclusion, and I got no answer to the question.

It appears to me to be a question between two interpretations, one of which is according to the literal, grammatical, common sense construction of sect. 13, applying the language of the section to that state of facts where a road which had been the subject of a turnpike trust has ceased to be a turnpike road, either by effluxion of time or otherwise, and not applying it to a portion of the road. That is according to the grammatical and fair construction of it and it involves you in no difficulty. But you at once get into difficulty and expose yourself to the danger of doing injustice when you adopt the contrary construction. For that reason from the beginning I have thought that the Queen's Bench Division was right, and I agree now with the judgment of my noble and learned friends.

Order appealed from reversed; judgment of the Queen's Bench Division restored; respondents to pay the costs in the Court of Appeal and of this appeal; cause remitted to the Queen's Bench Division.

Lords' Journals 24th April 1883.

Solicitors for appellants: *Ridsdale & Son* for *Wilson & Hutton, Preston.*

Solicitors for respondents: *J. J. & C. J. Allen* for *Z. Mellor, Rochdale.*

[HOUSE OF LORDS.]

H. L. (E.) JOSEPH TUCKER . . . . . APPELLANT;

1883

AND

June 15. JOSEPH LINGER . . . . . RESPONDENT.

Landlord and Tenant—Custom of Country—"Mines and Minerals," whether reservation of includes Flints.

A farm was let under a written agreement reserving to the landlord "all mines and minerals, sand, quarries of stone, brick earth and gravel pits." A local custom (which, it was suggested, had grown up within the last 30 or 40 years) allowed tenants of such farms, let with a similar reservation, to take away the flints that were turned up in the ordinary course of good husbandry and to sell them for their own benefit. If the flints were not turned up and removed such farms could not be properly cultivated:—

Held, affirming the decision of the Court of Appeal, that the custom was reasonable and valid; and when read into the written agreement was not inconsistent with the reservation, even assuming (but without deciding) that the reservation of "mines and minerals" included such flints.

APPEAL from so much of an order of the Court of Appeal (Jessel M.R. and Lindley L.J., Cotton L.J. dissenting) as affirmed an order of Kay J. The facts (which for the purposes of this report appear sufficiently from the head-note) are fully set out in the report of the decisions below (1).

June 14, 15. *Davey* Q.C. and *C. H. Anderson* for appellant:—

The only questions raised by this appeal are: 1. Whether the alleged custom was excluded by the agreement between the appellant (the landlord) and the respondent (the tenant); 2. Whether such a custom is good; 3. Whether the custom was proved. 1. The words "mines and minerals" in the agreement include flints and therefore preclude the tenant from removing them. They include freestone: *Bell* v. *Wilson* (2); china clay: *Hext* v. *Gill* (3). *Attorney-General for Isle of Man* v. *Mylchreest* (4) is distinguishable. No evidence of a custom is admissible unless it be consistent with the terms of the written agreement, which

(1) 21 Ch. D. 18.
(2) 2 Dr. & Sm. 395; Law Rep. 1 Ch. 303.
(3) Law Rep. 7 Ch. 699, 712.
(4) 4 App. Cas. 294.

11 Jur. N.S. 437.

this is not: *Myers* v. *Sarl* (1), citing the notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C. p. 529 (5th ed.). The reservation of minerals vested in the lessor the flints, which did not pass by the demise to the lessee: *Duke of Hamilton* v. *Graham* (2). 2. The alleged custom is unreasonable and bad as destructive of the inheritance of another: *Attorney-General* v. *Mathias* (3). *Marquis of Salisbury* v. *Gladstone* (4) applies to copyholders only and does not conflict with the rule. 3. The evidence does not prove the custom, and the view of Cotton L.J. was right.

M'Leod Fullarton and *Burleigh Muir* for the respondent were not heard.

LORD O'HAGAN:—

My Lords, in this case the question is a very short one, and to me appears to be capable of being very easily determined. In the first place, has there been a custom established here,—a clear, distinct, reasonable custom, such as ought to be maintained by the law? In the next place, if there is such a custom is there anything in the contract of the parties, anything in the reservation, to interfere with that custom and prevent its operation?

The custom which is alleged is to take these flints as they are thrown up from the land in the course of husbandry, and to deal with them for the tenant's own profit and for the benefit of the land at the same time, and thus for the benefit of the reversioner of the land. The tenant takes those flints, and according to the universal and open custom he sells them to whomsoever he pleases. [After discussing the details of the evidence his Lordship proceeded:—] In my opinion there is such a preponderance of evidence as makes it the duty of your Lordships to hold that the custom, as a matter of fact, has been conclusively established.

With the greatest respect for that very learned and able judge, Cotton L.J., I cannot follow the reasoning of his judgment. Whatever may have been the case in 1835, or afterwards, with reference to the condition of an agricultural country of this kind, whatever may have been the right of highway surveyors, or the practice of the tenantry, all that is totally beside the question now, because

(1) 3 E. & E. 319. 7 Jur. N.S. 97.
(2) Law Rep. 2 H. L., Sc. 166, 168.
(3) 4 K. & J. 579. 4 Jur. N.S. 628
(4) 9 H. L. C. 692. 8 Jur. N.S. 625

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if in the intervening years a custom has grown up by the universal assent of all parties, that custom appears to me not to be affected by the circumstances which may have existed forty or fifty years ago. Therefore the only ground that I can see upon which Cotton L.J. has founded his judgment appears to me to be fallacious.

Nothing has been urged upon the second branch of the case, as to whether this is a reasonable and a legal custom. Nobody can contend that it is anything else. We have proof that the removal of the flints is a necessity for the proper management of the agricultural operations.

Therefore both upon the fact and upon the legality and reasonableness of the custom there can be no doubt. The only remaining question is whether the reservation of "mines and minerals" in the agreement is sufficient to overbear in any way the clear and conclusive evidence to which I have referred. The words are "mines and minerals;" and you must take the ordinary course, and read the custom into the lease, and see whether the custom is reconcilable with the words. The custom being what I have described, is the word "mineral" so clear and of such absolute meaning that it applies to these flints, and that its reservation cannot be reconciled with the custom? It appears to me that it is no such thing. You must take the whole matter together. I asked the learned counsel for the appellant for a definition of the word "minerals;" and according to his definition it would absolutely cover everything under the earth. Now this reservation is not merely of "mines and minerals," but of "brick-earth," and other things, which it would have been wholly unnecessary to insert at all if "mineral" had the universal operation which it would be necessary to attribute to it to make this argument well founded.

Upon the whole I see no contradiction between the reservation and the custom, and I move your Lordships to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. There has been a lease, or rather heads of agreement for a lease, in writing, of a farm in a district that has been and for convenience may well be called

"the flinty district;" and it is shewn upon the evidence beyond all controversy that when the fields are ploughed flints are turned up to the surface, and that some at least of those flints must in the ordinary course of good husbandry be removed from the land and placed somewhere or other. There must not be an excess of removal, because you may remove so many flints as to do mischief; but in the ordinary course of good husbandry you must remove some of them and place them somewhere; and such has been the case in this district, I suppose, ever since it was first cultivated, at all events it is the general course of business there. The respondent not only removed the flints from the field where they had been turned up, but sold them. There was, as I understand, in the first instance a controversy as to whether or not he had removed more flints than in the course of good husbandry he should have done. That point was debated below, but has not been brought by appeal to this House; we are to take it now that he has removed no more flints than in the course of good husbandry, on being turned up by the plough, ought to have been removed from the surface of the field and put somewhere. But he has sold them; and the question upon that has come before us. The referee has found that there was in this district a custom so generally known that it would be considered as tacitly incorporated in all leases, that custom being that a tenant might sell for his own benefit, without stint, all such flints as in the ordinary course of good husbandry he turned up and removed from his field in order to get them off the field and out of the way. It extended no further.

Now is this custom excluded by the terms of the agreement? The custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, "We exclude the unwritten customary incident," of course it is excluded; and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then too the unwritten clause must yield to and is excluded by the written one. Now what is meant by inconsistency within

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that rule of law? It must be taken that under this lease the lessee is to manage the land upon the most approved system of husbandry; that amongst other things he is to plough it well, and that the custom of husbandry implies that in ploughing it and turning up flints he is to remove some of those flints from the surface of the land. When such flints have been removed from the land the custom is that the lessee shall be at liberty to sell them to whom he pleases for the best price he can get, without stint. Then comes the clause which is said to exclude that—"The lessor reserves all timber trees and tellers, and all bodies of pollards, and all mines and minerals, sand, quarries of stone, brick-earth, and gravel pits, with liberty to enter to fell, cut down, dig, take, convert, and carry away the same, doing no unnecessary damage." Now neither the mines nor the minerals nor the sand nor the quarries of stone nor the brick-earth nor the gravel pits, in the sense of having gravel, would pass to the tenant with the surface of the land. But it was necessary for the landlord, if he meant to work them whilst the tenant's lease existed, to reserve to himself "liberty to enter to fell and cut down" (that is as to the trees) "dig, take, convert and carry away the same" (that is to all these matters) "doing no unnecessary damage." That was in order that he might come in and utilise his stone, his gravel, and so on.

Now whilst the flints were under the surface I think *Hext* v. *Gill* (1) shews that they were minerals; but I am assuming (which is by no means clear) that flints turned up and lying on the surface would be minerals within the meaning of this reservation. What is there in this inconsistent with the custom? When the tenant has picked up the flints in the course of good husbandry and taken them off the field, he may, says the custom, sell them. Says the express term, The landlord reserves such flints and liberty to enter, take, convert, and carry them away, doing no unnecessary damage. What is there inconsistent with the tenant selling them if he so pleases, or the landlord if he wants them coming in and taking them too? There is no necessity to construe this clause as having the effect, and I do not think that it has the effect, if it was intended, of excluding

(1) Law Rep. 7 Ch. 699.

this custom. Intended it was not in one sense, for those who drew it thought that there was no such custom, and of course did not intend to exclude it. But was it inconsistent with the custom, so as to have the effect of excluding it, even upon the supposition which I have made (which is not at all to be taken as a point that has been decided) that flints lying upon the surface of the land are minerals within the meaning of this clause? I think not.

That disposes of the first point: I now come to the other. It is not contended that the custom if proved is unreasonable at all. It being then admitted that the custom, if it exists, is reasonable, and it being incorporated in the agreement (for, in my opinion there is nothing in the reservation to exclude its operation) the question is whether the custom is sufficiently proved. Now as to that, I own, with great respect to Cotton L.J., that I think he went a little astray. [After referring to the details of the evidence and the referee's report, his Lordship proceeded:—] There is certainly evidence (I should have said overwhelming evidence) that such a custom exists. But the ground upon which it is disputed, and which the judgment of Cotton L.J. makes it necessary to inquire into, is this: Two witnesses said, what was probably quite true, that some thirty or forty years ago there was no market at all for flints in this district. As it is now, and was then, the necessary course of good husbandry to plough up the flints, they were piled up in rows along the hedges and left lying there, a nuisance to everybody, or at least of no use to anybody, and there then being no market for them, when it happened that there was use for them upon farm roads, or in building walls, or in repairing the buildings, or anything of that sort, they were used for that purpose; and also if the highway surveyor wanted flints he got them and used them for his purposes, paying something for them—what it was does not appear. Now these witnesses do not seem to have understood the matter. They thought that the highway surveyor had a right to come and take the flints by force from the land; and Cotton L.J. seems to have thought that it was a matter of evidence to be proved. I cannot agree with him. It depends upon the true construction of the Highway Act; and when you look at the Highway Act it is clear

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that there is no such power. [After reading ss. 51, 52, 53, 54 and 55 of the Highway Act (5 & 6 Wm. 4 c. 50) his Lordship proceeded:—]

Now those sections do not, as it appears to me, at all authorize the surveyor of his own will, without an order of justices, to take these flints lying at the side of the hedges and carry them away. I think it is extremely probable that when the surveyor found those flints lying there, which were of no use to any one, he, instead of exercising his powers, said to the occupier, "I will not exercise my powers and take you before justices, and so forth, but if you, the occupier, will let me have these flints at a price I will pay you something for them;" but it was not a matter of right. It may have been that while the flints were of very little or no value he paid very little for them, and probably the farmers at that time would be glad to get them out of their way. Then when there came to be a change, and when, principally owing to the introduction of railways, flints gathered in this way had a mercantile value, there arose quite a new state of things—the surveyor could no longer get them for little or nothing, he had to compete with the flint-jobbers and others who bought them; and it came to pass then that flints were in fact sold, and the principal buyer, as we are told, was the Highway Board, which consisted of the landlords of the district, and as to whom therefore their buying in that way was the strongest and best evidence which could be given that such a practice and such a custom, to the extent to which it has been shewn, was notorious, as the referee has observed.

Now Cotton L.J., as I think, quite misapprehends what is the state of the law as to the surveyor taking the stones. The law being as I have pointed out (as it seems to me clear under the Highway Act that it is), and the surveyors of highways having been at first the only buyers, and being now necessarily the principal buyers, but having others to compete with them, and the fact being that the prices are considerably higher now, so far from that disproving the custom it seems to me a very strong argument indeed in favour of saying that the custom is really proved. Upon that point I agree with, I think, every one who has had to do with the case except Cotton L.J., and I must own

that to my mind, with all respect for that learned judge, his reasons for thinking the custom not proved are not good.

LORD FITZGERALD :—

My Lords, I am entirely of the same opinion upon all the questions which have been raised in this case.

Upon the question whether this custom has been established in evidence I adopt the view of the referee.

Upon the question whether the custom is reasonable or not, I must confess I think that Cotton L.J. has fallen into error. He seems to have had the thought pressing itself upon his mind that this custom was not even established, and that in fact it was not a reasonable custom. I rather gather from his statement that if it had rested with him alone, even though there had been evidence to sustain the usage, he would have decided against it as unreasonable. He says that it is unreasonable because it enables the tenant to sell a part of the inheritance. That in one sense is literally true, but when you look at it in its reality it is unsound. According to the contract the tenant is obliged to use and cultivate his farm in the best and most husbandlike manner. In the course of the cultivation he must plough it, and the plough brings up to the surface flints of various sizes, and it is absolutely necessary that he should pick and remove some of these flints. What is to be done with them? Are they to be left lying upon the farm? If they are it is doing further mischief; it is leaving them to encumber the ground and to occupy a space which otherwise would be used for cultivation. It is obvious then that for the proper use of the farm the flints so picked should be removed from the farm. When once they are taken off the farm they cease to be a portion of the inheritance and they become mere chattels. At one time they were probably of no value or of little value; and probably the origin of this custom was that the tenant acquired the privilege of removing them; and in order to recoup him for the expense or for a portion of the expense of removing them, when removed he was allowed to sell them. I think that Mr. Anderson properly gave up, as one would expect from him, the argument that this was an unreasonable custom.

The only question then remaining is whether upon the true

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construction of the agreement it excludes this custom. I quite agree with the view of Jessel M.R. and of Lindley L.J. that there is nothing at all in the existence of this custom inconsistent with this reservation of mines and minerals, but that on the contrary it would be repugnant and absurd if one were to come to the conclusion that under the reservation of mines and minerals here, with the object for which that reservation is made, it is intended that you are to reserve for the landlord as minerals the flints brought up by the plough to the surface, and which the tenant is under an actual obligation in the course of good husbandry to remove from the surface. I quite concur in the construction given by the Court below as well as by my noble and learned friend opposite (Lord Blackburn) to this clause of the agreement. There is no inconsistency between it and the custom, and I think that the custom must prevail.

Now with reference to the agreement being explained by the evidence, Mr. Pym, the chairman of the Highways Committee and a farm and land valuer, speaks of the custom as a matter beyond any doubt, and he adds this, which is very important, "The usual clause as to mines is in all leases." (By "clause," I suppose him to mean "reservation," and I will read it "reservation.") "The usual reservation as to mines is in all leases, and the custom of picking flints co-exists." Therefore it is quite established that in the interpretation of that reservation as regulating the rights of landlord and tenant, where there is such a reservation, nevertheless the custom goes on.

Upon none of the points in this case do I entertain the slightest doubt, and I concur in the judgment of the Court below.

Order appealed from affirmed, and appeal dismissed with costs.

Lords Journals 15th June 1883.

Solicitors for appellant: *Mercer & Mercer.*
Solicitors for respondent: *Morrisons, for G. C. Morrison, Reigate.*

[HOUSE OF LORDS.]

H. YOUNG & CO. . . . . APPELLANTS;

AND

THE MAYOR AND CORPORATION OF ROYAL LEAMINGTON SPA . . . } RESPONDENTS.

H. L. (E.)
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June 5.

Contract not under Seal but executed—Urban Authority—Public Health Act 1875 (38 & 39 Vict. c. 55) ss. 173, 174.

Subs. 1 of sect. 174 of the Public Health Act 1875 (38 & 39 Vict. c. 55), which enacts that "every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority," is obligatory and not merely directory, and applies to an executed contract of which the urban authority have had the full benefit and enjoyment, and which has been effected by their agent duly appointed under their common seal.

Hunt v. *Wimbledon Local Board* (4 C. P. D. 48) approved.

APPEAL by the plaintiffs from a judgment of the Court of Appeal (Brett, Cotton, and Lindley L.JJ.) affirming a judgment of the Queen's Bench Division (Williams and Mathew JJ.) in favour of the defendants.

The facts are stated in the report of the decisions below (1), and in the judgment of Lord Blackburn in this House.

May 1, 2. *Davey* Q.C. and *Edwyn Jones* for the appellants :—

The question is whether the absence of the seal is fatal to the plaintiffs' right to recover, and that must be considered first, apart from the provisions of the Public Health Act 1875; and, secondly, as affected by that Act. The provisions of that Act are merely directory, not conditions precedent, and if the law would imply a contract apart from them they do not bar the remedy. The corporation have adopted the contract, and cannot now plead their own disability for want of a seal when they have taken the benefit of an executed contract; for an action can be maintained on an executed contract if made for the purposes for which the corpora-

(1) 8 Q. B. D. 579.

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tion was created, though it be not under seal. See *Clarke* v. *Cuckfield Union* (1), which collects the earlier authorities, and *Church* v. *Imperial Gas Co.* (2). The only case in which the principle laid down by Wightman J. in *Clarke* v. *Cuckfield Union* (1) as to executed contracts was not adopted, is *Lamprell* v. *Billericay Union* (3) which is distinguishable. One of the reasons for which this corporation existed was to supply water: Public Health Act 1875 s. 51. *Paine* v. *Strand Union* (4) shews the difference between contracts for things for the express purpose of which the corporation exists, and contracts only ancillary to such things. The principle laid down in *Clarke* v. *Cuckfield Union* (1) has been followed in *Nicholson* v. *Bradfield Union* (5); *Haigh* v. *North Bierley Union* (6); *Sanders* v. *St. Neot's Union* (7). *London Dock Co.* v. *Sinnott* (8) was only an executory contract, and is therefore not opposed to the principle contended for. Down to *Clarke* v. *Cuckfield Union* (1) the current of authority was not uniform, but that has been the starting point of a uniform series of decisions, making three classes of exceptions to the rule that the contracts of a corporation must be under seal: 1. Where the contract is executed, 2. In small matters of very frequent occurrence, 3. Where it is impossible to affix the seal in time: see also *Mayor of Stafford* v. *Till* (9); *East London Waterworks Co.* v. *Bailey* (10); *London and Birmingham Ry. Co.* v. *Winter* (11); *Beverley* v. *Lincoln Gas Co.* (12); *Horn* v. *Ivy* (13). *Paine* v. *Strand Union* (4), rightly understood, is in favour of the appellants; so is *Mayor of Ludlow* v. *Charlton* (14), for there the question of the object for which the corporation existed did not arise. But see per Parke B. in *Finlay* v. *Bristol and Exeter Ry. Co.* (15). That being the state of the general law as to the contracts of corporations, the further question is the effect of the Public

(1) 21 L. J. (Q.B.) 349.
(2) 6 A. & E. 846.
(3) 3 Ex. 283.
(4) 8 Q. B. 326.
(5) Law Rep. 1 Q. B. 620.
(6) E. B. & E. 873; 28 L. J. (Q.B.) 62.
(7) 8 Q. B. 810.
(8) 8 E. & B. 347; 27 L. J. (Q.B.) 129.
(9) 4 Bing. 75.
(10) 4 Bing. 283.
(11) Cr. & Ph. 57.
(12) 6 A. & E. 829.
(13) 1 Ventr. 47.
(14) 6 M. & W. 815.
(15) 7 Ex. 409.

Health Act 1875 ss. 173, 174. That Act created no new corporation in municipal boroughs, and the provisions of the sections are merely directory; not imperative, so as to create a condition precedent: *Nowell* v. *Mayor of Worcester* (1), decided under the Public Health Act 1848 (11 & 12 Vict. c. 63). *Frend* v. *Dennett* (2) was also under the Act of 1848, but is distinguishable, for the corporation was the creature of the Act, and had no separate existence. See also *Kirk* v. *Bromley Union* (3) as to the view taken of such cases in the Equity Courts, and *Andrews* v. *Mayor of Ryde* (4). The Court below relied on *Hunt* v. *Wimbledon Local Board* (5), which may be supported on the authority of *Paine* v. *Strand Union* (6), but does not cover this case. It is a decision on the point as to whether the sections are mandatory or only directory, and so far the House should overrule it.

Sir *F. Herschell* S.G. *Mellor* Q.C. and *Dugdale* Q.C. for the respondents, were not heard, but were informed that notice would be given if the House, after taking time for consideration, desired to hear their arguments.

June 5. LORD BLACKBURN :—

My Lords, this is an appeal against an order of the Court of Appeal, dismissing with costs an appeal against the judgment of the High Court of Justice, Queen's Bench Division, in favour of the respondents, on a special case.

The arguments of the appellants' counsel were fully heard on the 1st and 2nd of May, and the further hearing of the cause was then adjourned sine die. I believe all the noble and learned Lords who heard the argument agree with me in thinking it unnecessary to call upon the counsel for the respondents to argue, as they all agree that the order appealed against must be affirmed.

By the special case it appears that the municipal corporation of the Royal Leamington Spa are, under the 6th section of the

(1) 9 Ex. 457; 23 L. J. (Ex.) 139.
(2) 4 C. B. (N.S.) 576.
(3) 2 Ph. 640.
(4) Law Rep. 9 Ex. 302.
(5) 4 C. P. D. 48.
(6) 8 Q. B. 326.

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Public Health Act 1875 (38 & 39 Vict. c. 55), acting by their council, the urban authority for the district, consisting of the borough. The defendants, as such urban authority, had made a contract under their seal with one Powis for the execution of works for supplying the district with water. Powis failed to complete his contract, and it was put an end to. The council, in their capacity of urban authority, as far as they could do so by resolutions not under seal, authorized their engineer and surveyor, Mr. Jerram, to enter into a contract for completing the works left not completed by Powis.

The special case then proceeds: "Thereupon the said Jerram, as the engineer, agent, and servant of the corporation, and acting within and according to his duties, powers, and authorities as such, and also acting in accordance with and in fulfilment of the provisions of the said condition 115 of the said contract with the said Charles Powis, employed the plaintiffs to execute, carry out, and complete the said unfinished works according to the contract and specification aforesaid, and also to execute and complete the said additional works upon certain terms then agreed upon between them; and the plaintiffs accepted and entered upon the said employment upon the said terms, and completed the whole of the works, including what has been described as the 'contract works,' and the 'additional works,' to the entire satisfaction of the said engineer. The said employment of the plaintiffs was in fact an employment of them by the corporation through the said Jerram as their engineer, agent, and servant, and the relation of employer and employed never in fact existed or was created between the plaintiffs and the said Jerram. A memorandum in writing of the said employment and of the agreement between the said Jerram and the plaintiffs was made on the 19th day of September, 1878, and was signed by both parties, and a copy of this memorandum marked A is annexed to and forms part of this case. The plaintiffs and the said Jerram fully performed the said agreement on their several and respective parts, and the said Jerram gave to the plaintiffs certificates for the payment of the moneys due to them from the corporation for all the works completed by them as aforesaid. The execution of the said 'additional works' was necessary and was incidental to the

completion of the works left unfinished and incomplete by the said Powis, and the employment of the plaintiffs to execute them was within the duties, powers, and authorities of the said Jerram as the engineer of the corporation. The defendants, the corporation, have taken possession of and accepted and received the benefit of all the works and materials the subject of this action, and still enjoy the benefit thereof. The corporation paid to the plaintiffs large sums of money from time to time upon the said certificates, but refused to pay other large sums amounting to between £6000 and £7000, which is the said balance now claimed by the plaintiffs as still due. The above-mentioned contract between the said Charles Powis and the defendants, the corporation, was made by them as an urban authority under the Public Health Act 1875, 38 & 39 Vict. c. 55, and all the subsequent matters and things were done by them in that capacity. The corporation resist the plaintiffs' claim upon several grounds, some of which would involve a long and costly investigation, but they also resist the claim upon the ground that the employment of the plaintiffs was an employment of them not under the common seal of the corporation, and this special case has been stated to raise that point alone. It is agreed between the parties that either party shall be at liberty to refer to the pleadings and particulars in the action, and to the contract and specification with Powis, the appointment of Jerram as borough surveyor, and the printed particulars of duties therein referred to, and that the Court is to have power to draw any inferences of fact. The question for the opinion of the Court is, whether the absence of the common seal of the corporation in the employment of the plaintiffs under the circumstances above stated, is fatal to the plaintiffs' right to recover against the corporation. If the Court shall be of opinion in the affirmative, then the judgment is to be for the defendants, the corporation. If in the negative, the judgment is to be for the plaintiffs."

The Queen's Bench Division answered the question in the affirmative, and gave judgment for the defendants. The Court of Appeal affirmed that judgment. Lindley L.J. ends his judgment by saying: "The last point urged for the plaintiffs was, that as the contract has been performed and the defendants have

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the benefit of the plaintiffs' work, labour, and material, the defendants are at all events liable to pay for these at a fair price. In support of this contention cases were cited to shew that corporations are liable at Common Law quasi ex contractu to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them. The case of *Frend* v. *Dennett* (1)—and in Chancery before Page Wood V.C. (2)—is an authority in support of this view, and was, in my opinion, rightly decided. The additional works there in question had been executed, and there was the common count for work and labour and materials as well as a special count on the alleged contract; but the defendant was held not liable either at law or in equity. It may be said that this is a hard and narrow view of the law; but my answer is that Parliament has thought expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship. For these reasons I am of opinion that the decision of the Court below was correct, and that this appeal ought to be dismissed, with costs. I am requested by Cotton L.J. to say that he has read this judgment, and concurs in it."

"Brett L.J.:—I should wish to say that I have come to the same conclusion after weeks spent in attempting to come to

(1) 4 C. B. (N.S.) 576. (2) 5 L. T. (N.S.) 73.

another. However, I come to the same conclusion as Lord Justice Lindley and Lord Justice Cotton in this case, upon the ground that, although this was a municipal corporation, yet in the transaction in question it was acting as a board of health, and that therefore it was bound by the statute, and that as to the construction of that statute we are bound by a former decision of this Court which held that the enactment as to the necessity for a seal is mandatory and not merely directory. Therefore, assuming that everything was done according to the statute except the seal, and that the work was done after every inquiry had been made by the corporation which is directed by the statute, I am of opinion that the mere want of seal prevents the plaintiffs from recovering in this action. Further, after having read all the cases with regard to the doctrine of work done for and accepted by a corporation, I am bound to say that I have come to the conclusion that even if this were a municipal corporation not bound by the statute, the proper decision in point of law, according to the cases and principle, is that the want of seal prevents, in such a case as this, the plaintiffs succeeding."

The present Master of the Rolls has, I observe, in the revised report somewhat altered what I have taken from the shorthand note in the papers before this House, and in that revised report (1) abstains from expressing an opinion as to how the law would have been if this had been the case of a municipal corporation not bound by the Public Health Act 1875—I suppose because on reflection he saw that it was not necessary for the decision of the case to decide this, and that what he had said on that point was only an obiter dictum. I agree in this latter view, and also in what Lindley L.J. says, that the cases are numerous and conflicting, and that they require revised and authoritative exposition by a Court of Appeal. If I thought this case now at bar gave an opportunity for such a review, I should certainly wish at least to hear the case fully argued. As it is, I do not think it necessary, and therefore do not think it right to examine the previous decisions and doubts further than is required for the purpose of construing the Public Health Act 1875 s. 174, which is in the following terms: "With respect to contracts made by an

(1) 8 Q. B. D. 586.

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urban authority under this Act, the following regulations shall be observed, namely: 1. Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority. 2. Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed." The 3rd and 4th regulations are as to things to be done by the urban authority before entering into any contract.

It was pointed out that there were no negative words added to the 1st regulation, that it was not said, "shall be sealed with the common seal and not otherwise." And it was argued that, as the 3rd and 4th regulations clearly were only directory, and the 2nd might at least plausibly be argued to be only directory, the 1st regulation should be construed as also only directory; that the common seal ought to be affixed whenever the subject-matter of the contract exceeded £50, but that if the contract was such as, but for the statute in question, to bind a corporation without seal, then it was said, "fieri non debet, factum valet."

I think, however, that when we look at the state of the decisions existing in 1875, and what was the point on which, I think, there was a difference of opinion sufficiently marked to make it uncertain what the ultimate decision of the Supreme Court of Appeal upon them might be, and then inquire what was the intention of the Legislature in passing this enactment, it is impossible to construe it in the manner ingeniously suggested.

The Court of Queen's Bench had, in *Church* v. *Imperial Gas Company* (1), thus expressed its view on the law: "The general rule of law is that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit

(1) 6 Ad. & E. 861.

that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."

This was said in 1838. In 1840 the case of *Mayor of Ludlow* v. *Charlton* (1) was decided in the Court of Exchequer. The considered judgment of the Court, comprising on that occasion Parke, Alderson, and Rolfe BB., was delivered by Rolfe B. After citing the passage I have just read from *Church* v. *Imperial Gas Company*, he says (2): "To every word of this we entirely subscribe; and, applying the language of Lord Denman to the present case, it is quite clear that there was nothing to enable the corporation of Ludlow to contract with the defendant otherwise than in the ordinary mode under the corporate seal."

So far there is no difference between the Courts of Exchequer and of Queen's Bench as to the law, though there was evidently room for considerable difference as to its application. I pass by many subsequent decisions, and only quote two. In 1852 Wightman J., sitting alone in the Bail Court, decided *Clarke* v. *Cuckfield Union* (3), on the ground, I think, that a poor-law union, created by statute, for the purpose, amongst others, of supporting the paupers in a workhouse, could not be required to affix their seal to every contract for things necessary for that purpose without such inconvenience as would defeat the object within the principle laid down in *Church* v. *Imperial Gas Company* (4).

In 1855 in *Smart* v. *Guardians of the West Ham Union* (5),

(1) 6 M. & W. 815.
(2) 6 M. & W. 822.
(3) 21 L. J. (Q.B.) 349.
(4) 6 A. & E. 846.
(5) 10 Ex. 867.

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Parke and Alderson BB. each expressed dissent from *Clarke* v. *Cuckfield Union* (1). They could not, as they were not in a Court of Error, overrule it, but undoubtedly questioned it. In 1866, in *Nicholson* v. *Bradfield Union* (2), where the union had bought coals to keep the paupers warm, the Court of Queen's Bench, in a considered judgment, say, "The case of *Clarke* v. *Cuckfield Union* (1) is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision; and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present at least, the case was rightly decided. There may be cases in which the circumstances are different from those in *Clarke* v. *Cuckfield Union* (1) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke* v. *Cuckfield Union* (1) we prefer to follow the authority of *Clarke* v. *Cuckfield Union* (1), which we think founded on justice and convenience."

There was not, I believe, any decision on this question between 1866 and 1875. The legislature in the earlier part of the Act of 1875 had incorporated all urban authorities which were not already corporations; those which were already corporations continued such; and then in Part V. of the Act it makes provisions as to contracts. We ought in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law; and in the present case I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. I think, bearing in mind this, it is not possible to construe sect. 174 as meaning anything else than that when the subject-matter of a contract exceeds £50 in value the contract must be under seal; and that the distinctions and differences which, according to the opinions of the Court of Queen's

(1) 21 L. J. (Q.B.) 349. (2) Law Rep. 1 Q. B. 620, 627.

Bench, might dispense with a seal in the case of an ordinary corporation should not do so when the contract was by an urban authority, and related to a subject-matter above that value. This was the construction put upon the Act in *Hunt* v. *Wimbledon Local Board* (1), as well as in the Court below. I think it is right, and it disposes of this appeal.

It is true that this works great hardship upon the now appellants. They had an agreement, but it was not sealed; and though it is possible that if the agreement had been under seal the defendants might have established a defence on the merits to all or part of what is claimed, it is hard on the appellants that they should not be allowed to raise the question. It is, however, for the legislature to determine whether the benefits derived by enforcing a general rule are or are not too dearly purchased by occasional hardships. A Court of law has only to inquire, What has the legislature thought fit to enact?

I therefore move that the order appealed against be affirmed, and the appeal dismissed, with costs.

Lord Watson, who is unavoidably absent, has read, and desires me to say that he concurs in, this opinion.

LORD BRAMWELL:—

My Lords, I agree that this judgment should be affirmed. It is clear, and is admitted by the appellants, that it must be affirmed if the Public Health Act 1875 sect. 174, is obligatory and not directory merely. I have no doubt that it is obligatory; and I must say I think better reasons can be given for that opinion than I gave in the case of *Hunt* v. *Local Board of Wimbledon* (1). In the first place, considering the state of the law as to contracts by corporations, it was desirable that some rule should be laid down as to how contracts could be made by urban authorities. Then we have plain and positive words in sub-sections 1 and 2,—"*Every* contract made by any urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority. Every such contract shall specify the work and materials, &c." The only reason given at your Lordships' bar for holding that this is directory only was that it

(1) 4 C. P. D. 48.

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is in company with other provisions in sub-sects. 3 and 4 which certainly are directory only, and that sub-sect. 5 says, every contract entered into by an urban authority *in conformity* with the provisions of this section "and duly executed by the other parties thereto shall be binding." And it was said that as the contract need not be in conformity with some of those "provisions" it need not be in conformity with any. But sub-sects. 3 and 4 do not deal with the contract or the making of the contract, but say, "*Before* contracting," and "*before* any contract of the value of £100 or upwards is entered into," &c. These are things to be done *before* contracts are entered into, and done by the urban authority, the contractor having nothing to do with the matters mentioned. The contracts are "entered into" afterwards. If sub-sects. 3 and 4 had been put before sub-sects. 1 and 2, the matter would have been too plain for argument, if indeed it is not as it stands.

As I think the case turns on the construction of the statute, I have not thought it necessary to go into the doubtful and conflicting cases governed by the Common Law.

I must add that I do not agree in the regret expressed at having to come to this conclusion. The legislature has made provisions for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. Whether that has been so in this case I have no notion; but certainly the ratepayers of Leamington may well be astonished at the amount claimed of them. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.

I desire to add that I did not use the word "build" in speaking of the making of a railway (1). I should as soon think of saying "building" a footpath.

(1) 4 C. P. D. p. 53, line 9.

LORD FITZGERALD :—

My Lords, at the close of the argument on behalf of the appellants I had reached the conclusion that the appeal must be dismissed, upon the construction of the statute, on the ground shortly put by my noble and learned friend beside me (Lord Bramwell). I have since had the advantage of reading the elaborate judgment of my noble and learned friend opposite (Lord Blackburn), in which I entirely concur, and to which I have nothing to add.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 5th June 1883.

Solicitors for appellants: *John Mackrell & Co.*

Solicitor for respondents: *H. Tyrell* for *H. C. Passman, Leamington.*

[PRIVY COUNCIL.]

J. C.* 1883 March 9, 10; April 18.

JOHN THOROLD CARTER . . . . APPELLANT;

AND

ALEXANDER MOLSON . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Civil Code of Lower Canada, Art. 2274—*Consolidated Statutes of Lower Canada, c.* 87, *s.* 12—*Code of Civil Procedure of Lower Canada, Arts.* 766, 1178, *and* 1360—*Right of Appeal—Special Leave of Appeal.*

The general intention of the Canadian Legislature seems to have been that the Civil Code and the Code of Civil Procedure, which latter Code came into force ten months after the former, should stand together and be construed together; *quære*, therefore, whether s. 1360 of the latter Code repealed not only all laws in force before the passing of either Code, but also all parts of the former Code which touched procedure.

Held, that Art. 2274 C. C. should be read as meaning that any debtor imprisoned or held to bail in a cause wherein judgment for a sum of $80 or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property according to the rules and subject to the penalty of imprisonment in certain cases provided in c. 87 of the Consolidated Statutes *until the Code of Civil Procedure comes into force* and *then* in the manner and form specified in the Code of Civil Procedure; the italicized words being interpolated so as to fulfill (see art. 12 of C. C.) the intention of the Legislature and to attain the object for which the article was passed.

Consequently the penalty of a year's imprisonment cannot be imposed on a person refusing to perform the duty prescribed by s. 766 of the C. C. P., inasmuch as the same is not authorized by any of the provisions of the said Code. As to how he is compellable to perform such duty,—*quære.*

Held, that under Art. 1178 C. C. P., no appeal lies as of right from a judgment of the Court of Queen's Bench for Lower Canada in the matter of a penalty of imprisonment.

Special leave of appeal granted on the ground of the importance of the question at issue.

APPEAL from a judgment of the Court of Queen's Bench (March 6, 1882) which reversed a judgment of the Superior

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Court (Sept. 17, 1880) ordering that the respondent should be imprisoned in the common goal of the district of Montreal for the space of one year.

This order was made in the course of certain proceedings taken by the appellant to enforce a judgment rendered at his suit against the respondent on the 17th of April, 1877, for the sum of $32.072, 98*c*. The Code of Civil Procedure of Lower Canada, arts. 796–833, enables a plaintiff in certain cases to have the person of his debtor placed in judicial custody by means of a writ of capias ad respondendum, and contains rules regulating the proceedings of both parties in such cases. Accordingly, the respondent was arrested at the instance of the appellant under such writ of capias ad respondendum, issued out of the Superior Court of the district of Montreal, and gave bail June 16, 1877, under art. 825 of the said Code. After proceedings which it is unnecessary to set out, the Superior Court gave judgment on the 8th of July, 1880, declaring the writ and the arrest made thereunder good and valid and executory according to law for the recovery from the respondent of the sum due under the above judgment of the 17th of April, 1877, and condemned the respondent to pay the appellant the said sum.

The Civil Code of Lower Canada, art. 2274, provides: "Any debtor imprisoned or held to bail in a cause wherein judgment for a sum of $80 or upwards is rendered, is obliged to make a statement under oath and a declaration of abandonment of all his property for the benefit of his creditors according to the rules, and subject to the penalty of imprisonment in certain cases provided in c. 87 of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure. The Consolidated Statutes, Lower Canada, c. 87, s. 12, subss. 1, 2, provide that such judgment debtor shall within thirty days from the rendering of the judgment file in the office of the Prothonotary of the Court such statement and declaration, and that if he neglects to file it then the Court shall order the defendant to be imprisoned in the common gaol of the district for such period not exceeding one year as the Court thinks reasonable.

The Code of Civil Procedure under the heading of Abandon-

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ment of Property, arts. 763, 780, contains provisions relative to such abandonment, and by art. 766 provides: "A debtor who has been admitted to bail is bound to file this statement within thirty days from the date of the judgment rendered in the suit in which he was arrested." The article does not contain any specific penalty for neglect to comply with this provision.

The Code of Civil Procedure further provides, art. 1360, "The laws concerning procedure in force at the time of the coming into force of this Code are abrogated in all cases in which such laws are contrary to or inconsistent with any provision of this Code, or in which express provision is made by this Code upon the particular matter to which such laws relate."

The Civil Code came into force on the 1st of August, 1866, and the Code of Civil Procedure on the 28th of June, 1867.

The respondent did not satisfy the judgment of the 8th of July, 1880, and did not within thirty days therefrom file a statement and declaration of abandonment of his property.

Thereupon, on the 3rd of September, 1880, the appellant presented a petition to the Superior Court for an order for the imprisonment of the respondent, and the Court made the order by the judgment of the 17th of September, 1880.

The respondent appealed to the Court of Queen's Bench (Appeal Side), which reversed the judgment below by the above-mentioned judgment of the 6th of March, 1882. This judgment is set out in full in the judgment delivered by their Lordships.

The appellant, on the 17th of March, 1882, obtained an order of the Court of Queen's Bench granting him leave to appeal to Her Majesty in Her Privy Council.

The respondent in his case presented to the Privy Council submitted among his reasons that no appeal lay as of right from the judgment of the 6th of March, 1882, to Her Majesty in Council.

F. W. Gibbs, Q.C., and *H. Bargrave Deane*, for the appellants, contended that the objection to the right of appeal was made too late: *Sauvageau* v. *Gauthier* (1); and prayed that if the objection was held good special leave of appeal might be granted. Upon the merits they contended that art. 2274 of the Civil Code,

(1) Law Rep. 5 P. C. 494.

by specifically attaching to the obligation of the debtor to make a statement under oath and a declaration of abandonment of all his property for the benefit of his creditors, the penalty of imprisonment provided in chap. 87 of the Consolidated Statutes of Lower Canada took the matter of imprisonment out of inter procedure and continued the penalty provided by the statute, leaving in terms the manner and form of the statement and declaration to the Code of Civil Procedure. They referred to the Acts respecting the codification of the laws of Lower Canada relative to civil matters and procedure: Cons. Stats. of Lower Canada, c. 2; 29 Vict. c. 41; 29 & 30 Vict. c. 25; Report of Commissioners for Civil Code, III. 74; Report of Commissioners for Code of Civil Procedure, XXIII.

On the proceedings in the case they referred to *Henderson* v. *Lamoureux* (1).

Kenelm Digby, for the respondent, on the right of appeal, referred to *Goldring* v. *La Banque d'Hochelaga* (2), and contended that the Code of Procedure was intended to provide a complete system of procedure in regard to the subjects under the headings of Abandonment of Property and Capias ad Respondendum. This system on coming into force superseded that contained in the Consolidated Statutes, arts. 763–780 and 796–833. Art. 766 should be read as making express provision upon the debtor's obligation to file the statement required, and as it omitted the penalty contained in Cons. Statutes, c. 87, s. 12, such penalty must be held to be abrogated : Code of Civil Procedure, art. 1360.

F. W. Gibbs, Q.C., replied.

THEIR LORDSHIPS during the course of the argument gave their opinion that no appeal lay as of right under art. 1178 of the Code of Civil Procedure, but added that they were prepared, as the question raised was of importance, to advise Her Majesty to grant special leave of appeal upon a petition being presented for that purpose by the appellant. The appellant undertook to

(1) 17 Low. Can. Rep. 414. (2) 5 App. Cas. 371.

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present such a petition and to give fresh security as to the costs of appeal, and their Lordships directed the argument to be continued.

April 18. The judgment of their Lordships was delivered by

LORD BLACKBURN:—

This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec; by which that Court, by a majority of three to two, reversed a judgment of the Superior Court of Lower Canada.

The judgment is in the following terms:—

"6th March, 1882,

"Present: The Hon. Sir Antoine Aimé Dorion, Knight, Chief Justice; the Hon. Mr. Justice Monk, the Hon. Mr. Justice Ramsay, the Hon. Mr. Justice Tessier, the Hon. Mr. Justice Baby.

"The Court of our Lady the Queen, now here, having heard the appellant and respondent by their counsel respectively, examined as well the record and proceedings had in the Court below, as the reasons of appeal filed by the appellant, and the answers thereto, and mature deliberation on the whole being had;

"Considering that the appellant, arrested on a capias ad respondendum at the suit of the respondent, has been discharged, by giving security, under art. 825 of the Code of Civil Procedure, that he will surrender himself into the hands of the Sheriff, when required to do so by an order of the Court or Judge, within one month from the service of such order upon him or upon his sureties, and that in default such sureties will pay the amount of the judgment in principal, interest, and costs. And considering that by art. 766 and the following articles of the Code of Civil Procedure, express provision has been made concerning the matters provided for by chap. 87 of the Consolidated Statutes of Lower Canada and art. 2274 of Civil Code, as to the obligation of a debtor who, having been arrested on a capias ad respondendum, has been admitted to bail, to file a statement of all the property, real and personal, of which he is possessed, and that the

provisions of sects. 12 and 18 of the said chap. 87 of the Consolidated Statutes and art. 2274 of Civil Code have thereby been repealed under the provisions of art. 1360 of the Code of Civil Procedure.

"And considering that, although by the first paragraph of the above-mentioned art. 766 of the Code of Civil Procedure, a debtor who has been admitted to bail is bound to file the statement and declaration of all the property of which he is possessed, according to art. 764 of the said Code, within thirty days from the judgment rendered in the suit in which he was arrested, it is not provided in the said article, nor in any other article of the said Code, nor in any provision of law now in force, that, in default of filing such statement and declaration, such debtor shall be imprisoned or be subject to any penalty whatsoever.

"And considering that the judgment of the Superior Court sitting at Montreal on the seventeenth day of September, one thousand eight hundred and eighty, by which it was ordered that the said appellant should be imprisoned in the common gaol of this district for one year, is not, under the allegations of the petition on which such order was made, justified by law, and that there is error in the said judgment.

"This Court doth reverse the said judgment of the seventeenth day of September, one thousand eight hundred and eighty, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the petition of the said respondent presented to the said Superior Court on the third day of September, one thousand eight hundred and eighty. And doth condemn the said respondent to pay to the appellant the costs incurred in the said Superior Court on the said petition, as well as those incurred on the present appeal.

"(The Hon. Justices Ramsay and Baby dissenting.)"

The question, which their Lordships have found to be one of considerable difficulty, depends on the true construction of the two Codes of Lower Canada, the Civil Code, more particularly art. 2274 and arts. 2613 and 2614, and the Code of Civil Procedure, more particularly art. 766 and those following it, and art. 1360. There were careful and elaborate provisions for

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framing the two Codes in question; but notwithstanding all the precautions taken, there may be, and in fact in the present case there are, doubts as to what is the meaning of the language employed. And the Civil Code of Lower Canada, art. 12, is "that when a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the Legislature, and to attain the object for which it was passed."

It is therefore material to inquire how and why the two Codes were enacted, so as to ascertain what was the intention of the Legislature, and what the object for which they were enacted.

First, by statute 20 Vict. c. 43, which afterwards became the second chapter of the Consolidated Statutes of Lower Canada, Commissioners were appointed, who were directed (sects. 4, 5, and 6) to reduce into one Code, to be called the Civil Code of Lower Canada, those provisions of the laws of Lower Canada which relate to civil matters, and are of a general and permanent character, whether they relate to commercial cases or others, but excepting the laws relating to seigniorial or feudal tenure, and to reduce into another Code, to be called the Code of Civil Procedure of Lower Canada, those provisions which relate to procedure in civil matters and cases, and are of a general and permanent character. They were directed to embody therein such provisions only as they held to be then actually in force. They might suggest such amendments as they thought desirable, but were to state them separately. And they were directed to follow, as far as might be, the arrangement of the Code Civil of France. It was provided that, as the Commissioners proceeded with their work from time to time, there should be an opportunity given to the Judges to review their work, and make suggestions to the Commissioners, who were to consider, but were not bound to adopt, their suggestions. And by sect. 13 the Commissioners were required from time to time to incorporate with the proper portions of the said Codes such amendments as the Governor in Council thinks it right to recommend for adoption by the Legislature after considering the reports of the Commissioners, and those of the Judges, if any, but such amendments shall be carefully distinguished from the actual law. And then by sect. 14, "When the said Codes, or either of them, are completed, with

such amendments as last mentioned, printed copies thereof, and of the reports of the Commissioners, and of the Judges, if any, shall be laid before the Legislature, in order that such Code or Codes may be made law by enactment; and if it be found advisable that either of the said Codes be completed and submitted to the Legislature before the other, the Civil Code of Lower Canada shall be the first so completed and submitted.

"2. Either House may propose any amendments to either Code, but such amendments shall be proposed by resolutions, which may be passed by the one House and sent to the other for its concurrence, and shall be subject to amendment by the other, and be dealt with as a Bill might be until finally agreed to by both Houses, and shall then be communicated to the Commissioners, who shall with all possible despatch incorporate the substance of the amendments so agreed to with the proper Code, which may then be passed as a bill at the same or any other session."

The Civil Code was the first completed and submitted to the Legislature, and it was amended by resolutions agreed to by both Houses, but the Legislature did not quite pursue the course indicated by the latter part of sect. 14, sub-sect. 2. By 29 Vict. c. 41, s. 2, the Commissioners were directed to incorporate the amendments with the Civil Code, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

Power was also given to the Governor to select any Acts and parts of Acts passed during the last and present sessions, and cause them to be incorporated. And power was given to the Commissioners to make verbal and formal amendments, and so soon as the said work of incorporation was completed the amended Code was to be submitted to the Governor, who may cause a correct printed copy thereof, attested by his signature and that of the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council.

Then by sect. 6, "The Governor in Council may, after such deposit of the roll last mentioned, declare by proclamation the

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day on and after which the said Code, as contained in the said roll, shall come into force and have effect as law, by the designation of 'the Civil Code of Lower Canada,' and upon, from, and after such day the said Code shall be in force accordingly." The Governor in Council, by proclamation, named the 1st of August, 1866, as that day.

A precisely similar course was taken as to the Code of Civil Procedure of Lower Canada, the statute 29 & 30 Vict. c. 25, being in the same words as those of 29 Vict. c. 41, except that (Code of Civil Procedure of Lower Canada) is throughout substituted for (Civil Code of Lower Canada.) The day fixed by the proclamation for this Code coming into force is the 28th day of June, 1867.

So that there was a period of nearly ten months, during which the Civil Code was in force, before the Civil Code of Procedure came into force.

It seems implied in that part of the judgment which states "that there are express provisions in the Code of Procedure as to these matters," and that "the provision of sects. 12 and 18 of the Consolidated Statutes and art. 2274 of the Civil Code have thereby been repealed under sect. 1360 of the Code of Civil Procedure," that the majority of the Court of Queen's Bench put the construction on art. 1360 of the Code of Civil Procedure, that it repealed not only all laws in force before the passing of either Code, but also all parts of the Civil Code which touched procedure.

The literal meaning of the words "laws in force at the time of the coming into force of this Code" includes the Civil Code, for, as already pointed out, the Civil Code came into force some months before the Code of Civil Procedure did; but their Lordships are scarcely prepared to hold that the intention and object of the Legislature was that when a matter is included in the Civil Code which might without impropriety have been included in the Code of Procedure, and an express provision is made in the Code of Procedure upon that particular matter, the provisions of the Civil Code are abrogated as being laws concerning procedure in force at the time when the Code of Procedure came into force. The two subjects from their nature overlap, and in the

Code Civil of France, as well as in the Canadian Codes, much which might well be put into the one Code is placed in the other. There seems nothing to prevent laws in both Codes relating to the same subject from standing together, unless they are from their nature so inconsistent that the later enactment must be taken to repeal the earlier.

The 20th title of the Canadian Civil Code, relating to imprisonment in civil cases, is one which might have been placed under the head of procedure; and so might the 16th title of the French Code Civil, entitled, "De la Contrainte par Corps en Matière Civile," have been placed in the "Code de Procedure Civile." But in neither the Canadian Codes nor in the French Code has this been done.

The general intention and object of the Legislature seems to have been that the two Codes should stand together, and be construed together, and it may well be doubted whether the majority of the Queen's Bench have not given too much effect to the accident that the Codes did not come into force on the same day.

It is not, however, necessary to decide this, as, by a different chain of reasoning, the same result may be come to.

The preamble to the Statute 20 Vict. c. 43, which afterwards became the Consolidated Statutes, chap. 2, is this:—

"Whereas the laws of Lower Canada in civil matters are mainly those which at the time of the cession of the country to the British Crown were in force in that part of France then governed by the Custom of Paris, modified by provincial statutes, or by the introduction of portions of the law of England in peculiar cases; and it therefore happens that the great body of the laws in that division of the province exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin. And whereas the laws and customs in force in France at the period above mentioned have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer reprinted or commented on in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them. And whereas the reasons aforesaid and the great advan-

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tages which have resulted from codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the codification of the civil laws of Lower Canada."

From this preamble and the whole scheme of the legislation, their Lordships think that it was one main object of the Legislature to make the Codes as one may say self-contained. This object, however, has been apparently lost sight of in several places, and, amongst others, in the art. 2274 of the Civil Code, which is in the following words:—

"Any debtor imprisoned or held to bail in a cause wherein judgment for a sum of eighty dollars or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property for the benefit of his creditors, according to the rules and subject to the penalty of imprisonment in certain cases provided in chap. 87 of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure."

This cannot be understood, without reading and construing the statute referred to in order to see what rules and what penalties of imprisonment were provided by that statute, and then determining which of them were kept alive by this article; for, though this article does contain an express provision on at least part of chap. 87, and so by arts. 2613 and 2614 of the Civil Code does abrogate at least so much of chap. 87, yet it seems impossible to deny that the Legislature did intend, at all events until the Code of Civil Procedure should come into force, to re-enact by reference to the abrogated statute some penalties, and apply them to the things specified in art. 2274. And there is great difficulty in doing this. For though chap. 87, sect. 12 (1) does, in certain cases included in art. 2274, but not quite co-extensive with it, require a debtor against whom judgment for $80 or upwards has been rendered to file a statement of his property and creditors, and a declaration of his willingness to abandon the property in his statement mentioned to his creditors, and by sect. 12 (2) does impose penalties on a defendant neglecting to file such statement, yet there are no penalties co-extensive with

art. 2274, and there certainly are many penalties which, by chap. 87, sect. 18, are imposed upon debtors who have not been arrested, against whom a judgment has gone in a commercial cause, which cannot on any construction be kept alive by art. 2274. Those difficulties are all removed if art. 2274 is read as meaning "according to the rules and subject to the penalty provided in certain cases in chap. 87, *until the Code of Civil Procedure comes into force, and then* in the manner and form specified in the Code of Civil Procedure."

It is not to be denied that this is introducing words not to be found in the enactment, and so far is objectionable. But their Lordships think that art. 2274 of the Civil Code shews an intention on its face to hand over the whole of its subject matter to be dealt with by the provisions of the Civil Code of Procedure, or if that intention cannot be found on its face, then that the law contained in that enactment is "doubtful and ambiguous," and, though not without some doubt and difficulty, they think that the object and intention of the Legislature is such as to justify this construction.

If it is adopted, all difficulty vanishes. The articles of the Code of Civil Procedure do impose many penalties, but they do not impose the penalty of imprisonment for a year on the person refusing to perform that duty which he is by the express terms of art. 766 bound to perform.

The question how he is to be compelled to do so does not arise on this appeal. It is enough to say that he is not liable to imprisonment for a year.

Their Lordships think that the appeal must be dismissed. They will so humbly advise her Majesty.

The appellant must pay the costs of this appeal.

Solicitors for appellant: *Wilde, Berger, Moore, & Wilde.*
Solicitors for respondent: *Freeman & Bothamley.*

[PRIVY COUNCIL.]

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THOMAS SIMON AND OTHERS . . . . DEFENDANTS;

AND

WILLIAM HENRY VENABLES VERNON (PROCURATOR OF WARDLAW CORTLANDT ANDERSON AND MARGARET JANE TROTTER, HIS WIFE, WIDOW OF THE LATE JOSHUA LE BAILLY) . . . . . PLAINTIFF.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Public Register of Jersey—Registration by order of Court—Hypothec.

The legal effect of the registration in the public register of Jersey pursuant to an order of the Royal Court of a marriage contract, is to confer a right of hypothec in respect of its provisions from the date of the said order.

APPEAL from an act or judgment of the superior number or full Court of Appeal (April 19, 1882) unanimously confirming an act or judgment of the inferior number of Royal Court (June 4, 1881).

The question decided was whether the respondent, on behalf of his constituents, was under the circumstances stated in their Lordships' judgment entitled to recover from the appellant, as eldest son and principal heir of the late Pierre Jean Simon, the sum of £500 and interest, in an action commenced by Margaret Jane Trotter on the 29th of April, 1881.

Bertram (Attorney-General for the island), and *Latham*, for the appellants.

Davey, Q.C., and *Fishbourne*, for the respondent, were not called on.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

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The judgment of their Lordships was delivered by

LORD WATSON:—

Margaret Jane Trotter, now the wife of Cortlandt Anderson, was previously married, on the 14th of April, 1863, to the late Joshua Le Bailly, of "Les Vaux," Jersey. By an ante-nuptial contract, entered into in contemplation of their marriage, Miss Trotter renounced all legal claims competent to her, as widow, upon the estates real and personal of her husband; and, in consideration thereof, Mr. Le Bailly engaged for himself, his executors and administrators, that, in the event of her surviving him, his heirs, executors, and administrators should, immediately after his decease, "duly pay to her out of his personal estate the sum of £500 sterling for her own use and benefit exclusively," and should also, from and after the day of his decease, pay to her, out of "his estates real and personal," an annuity for life of £200 sterling. This contract was registered in the public register of the Island of Jersey, pursuant to an order of the Royal Court, obtained on the joint application of the spouses, dated the 7th day of April, 1863.

On the 23rd of August, 1873, the goods of the said Joshua Le Bailly were, by an order of the Royal Court, declared en désastre, and his personal property was sequestrated for the benefit of his creditors. By a subsequent order of the same Court, bearing date the 9th of January, 1875, his moveable and heritable estates were adjudged to be renounced, and leave was given to certain of his creditors "de faire décréter les dits heritages."

The proceedings en décret, so far as it is necessary to refer to them for the purposes of the present case, are as follows: A list is made up, before the greffier, of the whole creditors of the insolvent, each creditor being ranked according to the priority of his debt or claim. But in the list or codement prepared by the greffier the order of priority is inverted, the creditor having the first charge being placed last, whilst the first entry embraces all the unsecured creditors, who are ranked pari passu in one group. The greffier next summons the creditors before him, and calls first the unsecured creditors to accept or reject the insolvent's estate. If they reject, their claims are considered as cancelled, and the

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greffier proceeds to make the same call upon the puisné incumbrancer. If he rejects the estate, his claim is in like manner considered as cancelled, and the greffier calls upon the next incumbrancer in the order of the codement; and the same process is repeated until a creditor accepts, who is then declared to be "tenant," and thereby becomes entitled to the estate of the insolvent, and absolutely liable to pay, or settle in full, all claims inserted after his own in the codement. The obligation thus imposed upon the "tenant" is, in other words, the consideration for which he becomes purchaser of the insolvent's estate.

Margaret Jane Trotter, then the wife of Joshua Le Bailly, appeared as a claimant in the proceedings en décret which followed upon the order of the 9th of January, 1875, and gave in her marriage contract, together with the act of Court, of the 7th of April, 1863, authorizing its registration. The greffier entered her in the codement as an unsecured creditor under that contract, and called upon her, along with the other claimants sans hypothèques, to declare whether she elected to become "tenante" or to renounce. The lady thereupon objected, and maintained, by her counsel, "Qu'elle n'est pas obligée de parler en ce moment, l'acte de la cour qu'elle a inséré étant daté du 7 avril 1863, et enregistré au registre public à ladite date, devant porter ladite date dans ce décret." The obvious meaning of that contention was that the lady objected to her claim under the contract being dealt with as sans hypothèque, and insisted that the legal effect of its registration in the public register of the island by the authority of the Royal Court was to make her conventional provisions a charge upon the heritable estate of her husband from and after the 7th of April, 1863, the date of the order authorizing registration.

The greffier referred the question thus raised to the Court, and at the same time submitted to the Court his reasons for dealing with the lady's contract claims as an unsecured debt. The view taken by him was, in the first place, that no date could be assigned to the contract, because, even on the assumption that its insertion in the public register would have created a hypothèque, the documents given in did not contain any note by the registrar stating the day upon which the contract came into his

hands; and, in the second place, that the registration of the contract in the public register was for preservation merely, and did not make the wife's provisions a charge upon the heritable estate of her husband, which could only be effected by its insertion in the proper register, viz., the "livre des obligations."

When the question came before the Court, two creditors sans hypothèques, entered in the codement, appeared to resist the claim of Margaret Jane Trotter, and, inter alia, maintained, "qu'en vertu de la pièce produite, ladite dame ne peut prétendre à une hypothèque quelconque sur les biens de son mari, au préjudice tant des créanciers de celui-ci, que des personnes qui ont transigé avec lui depuis la date de son mariage."

The main issue raised for the decision of the Court was whether the recording of her marriage contract in the public register did or did not confer upon Dame Margaret Jane Trotter a right of hypothec, in respect of its provisions, which entitled her to be ranked in the codement as a secured creditor from and after the date of the order of Court giving authority to register. After hearing parties, the Court, on the 20th of March, 1875, rejected the views submitted to them by the greffier, and gave this decision in her favour:—"Considérant que le contrat de mariage dont il s'agit a été enregistré au registre public, la Cour a jugé qu'il doit porter au registre ou codement du décret dudit Josué Le Bailly, la date de l'acte ordonnant son enregistrement, savoir le 7 avril 1863."

In consequence of that decision, the codement was altered so as to give effect to it; and the entry of Margaret Jane Trotter's name and of her documents of debt was transferred from the class of unsecured to that of the secured creditors, the date assigned to her security being the 7th of April, 1863. After the usual procedure, Edwin Taylor, one of the creditors, ranked as sans hypothèque, elected to become "tenant," but by arrangement he transferred his rights and liabilities as such to Pierre Jean Simon; and these two gentlemen were, on the 27th of March, 1875, declared by the greffier to be respectively the "tenant" and "tenant subrogé" of all the heritages which had belonged to the insolvent, subject to the condition expressed in these words:—"à la charge audit tenant et audit tenant subrogé de payer toutes les

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dettes et hypothèques qui ne sont pas renoncées faute d'insertion." By order of the 13th of April, 1875, the Royal Court duly confirmed the appointment of Messieurs Taylor and Simon as tenant and "tenant subrogé."

After the death of Mr. Le Bailly, which occurred on the 19th of March, 1881, the widow claimed payment of her marriage contract provisions from the appellant, Thomas Simon, as the eldest son and representative of Jean Simon, the original "tenant subrogé." The appellant did not dispute his liability to pay the annuity of £200 provided to the widow, but he refused to make payment to her of the sum of £500 specified in the contract. The widow, on the 29th of April, 1881, instituted a suit, before the Royal Court of Jersey, for recovery of that sum, with interest from the date of her husband's decease; and the Court, on the 6th of June, 1881, decided in favour of the widow. Against that decree an appeal was taken to the full Court, who, on the 19th of April, 1882, confirmed the judgment of the Court below, and dismissed the appeal with costs.

The case, as it has been presented to this board, really involves no questions as to dower or as to the other rights to which a widow is entitled by the law or customs of the island of Jersey. The appellant does not maintain that the widow must be remanded to her legal rights; on the contrary, his contention is, that she must take her conventional provisions, but that the provision of £500 out of the personal estate of her husband is, by its very terms, not recoverable from him. Nor does the appellant dispute that, as representing the "tenant subrogé," he is bound to satisfy the widow's contract claims to the extent to which these were sustained by the order of the Royal Court in the reference made to them by the greffier with regard to the widow's demand to be ranked in the codement as a secured creditor.

An able and ingenious argument was addressed to us, with the object of shewing that the Royal Court, in directing Dame Margaret Jane Trotter's name and documents of debt to be entered in the codement, under date the 7th of April, 1863, only intended to treat her annuity of £200 as a secured debt, and neither intended to attach, nor did, in point of fact, attach, any hypothèque to the claim of £500. It was urged that the order of

the Court is expressed in general terms, without special mention of the provision of £500, and is therefore open to construction. The argument was rested not so much upon the terms of the order, or of the pleadings submitted to the Court before it was pronounced, as upon certain extrinsic considerations bearing upon the improbability of the Court having intended to decide that the claim for £500 had been converted into a preferable debt by the registration of the marriage contract in the public register. The appellant's contention really went no further than this, that if it were held that the Court so decided, they must be held to have given a bad decision, and therefore it must be presumed that they did not give it.

There seems to be no reason to doubt—indeed it was not controverted—that if the Court had decided, in express terms, that the debt of £500 was entitled to the same priority as the £200 annuity, the appellant could not now have challenged that decision. It necessarily follows that, if the reasonable inference to be derived from the terms of the judgment be that the Court did so decide, the appellant's challenge is equally barred, and he is liable to pay the sum sued for.

Their Lordships are unable to come to the conclusion that the decision of the Royal Court, of date the 20th of March, 1875, was an adjudication upon part only of the widow's claims under her marriage contract. When a creditor, appearing in proceedings for the distribution of his insolvent debtor's estate, produces and claims upon a document of debt which contains two separate obligations to pay by the insolvent, he must, unless something appear to the contrary, be understood as preferring a claim for both debts. Accordingly, it must be taken that Margaret Jane Trotter did claim, in the proceedings "en décret," to be ranked for the principal sum in question, as well as for her annuity. If it be assumed, as we think it must, that the lady claimed her provision of £500, as well as her annuity, it appears to be matter of necessary inference that she also claimed priority for both debts. It never was suggested, either before the greffier or before the Court, that there was or even that there might be a distinction between the two provisions in favour of the widow contained in the marriage contract produced. The claim of the widow as well

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as the objections of the greffier and the opposing creditors were stated and maintained on the footing that, as regarded priority, the same rationes were applicable to all the widow's marriage contract provisions; and the Court, by its order of the 20th of March, 1875, affirmed her claim to priority, in substantially the same terms in which that claim was preferred before the greffier.

It was further argued for the appellant that the widow cannot insist, as against him, for payment of the £500 in question, seeing that by the terms of the marriage contract that sum is payable out of a special fund—viz., the personal estate of the insolvent—and that the "tenant subrogé" has, in point of fact, taken nothing except heritable estate. It is by no means clear that an onerous obligation by A. to pay £500 out of his personal estate must be dealt with on the same principle as if it were a bequest of that amount by A., payable out of a special fund forming part of that estate. In the opinion of their Lordships, it is quite unnecessary to decide that point. The argument, if well founded, might, if it had been put forward in March 1875, have induced the Royal Court to uphold the ruling of the greffier in so far as it related to the provision of £500; but it does not appear to their Lordships to afford a good reason for disturbing the ranking of the widow's claims in the codement, as then settled by the judgment of the Court, and for relieving the "tenant subrogé" or his representatives of a debt the payment of which was made an essential condition of the title by which they acquired the heritable estates of the insolvent, the late Joshua Le Bailly.

Their Lordships will therefore humbly advise Her Majesty that the judgments appealed from ought to be confirmed, and the appeal dismissed with costs.

Solicitors for appellants: *Lambert, Petch, & Shakespear.*
Solicitors for respondent: *Saunders, Hawksford, Bennett & Co.*

[PRIVY COUNCIL.]

SCICLUNA AND ANOTHER . . . . . PLAINTIFFS; J. C.*

AND 1883

J. P. STEVENSON . . . . . DEFENDANT. *May* 31; *June* 1, 2, 5.

THE "RHONDDA."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF MALTA.

Admiralty Regulations of the 18*th March*, 1880, *art.* 21—*Narrow Channel*—*Collision.*

The Strait of Messina is a narrow channel within the meaning of Art. 21 of the Admiralty Regulations for preventing Collisions at Sea; as to what particular width or length will constitute a narrow channel, *quære.*

Held, that the *A. L.* by infringing the said article occasioned the collision which afterwards happened, and failed to establish that the *R.* by anything which she did contributed to it or could in any way have avoided it.

Held, that the *R.'s* helm having been put hard aport in a way which if successful would have put her on such a course as would have determined the risk of collision, the duty of reversing her engines did not arise till it was discovered that the vessel, owing to the action of a current, was not obeying her helm.

APPEAL from a judgment and definitive sentence of the Vice-Admiralty Court of Malta (June 23, 1882).

The appellants, as agents and representatives of the insurers of a French s.s., the *Alsace Lorraine*, and of the cargo, brought an action in rem against the English s.s. *Rhondda* to recover damages in respect of a collision which took place on the 30th of November, 1881, soon after 2 A.M. in the Straits of Messina, near the north east end.

The case on behalf of the appellants was that the *Alsace Lorraine*, with her regulation lights duly exhibited and burning brightly, was being navigated through the Straits at a speed of about six miles an hour, with all due and proper care, and with a good look-out kept on board her. That a few minutes after passing Pezzo Point, on the Calabrian coast, when she was

* *Present:*—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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heading north-east quarter-east, the *Rhondda* was sighted over Faro Point, at a distance of about two miles and a half, heading about south-east and bearing on the port bow of the *Alsace Lorraine*. That a few minutes afterwards the *Rhondda* was seen coming round Faro Point under a port helm. That as the *Rhondda* was seen to be porting the helm of the *Alsace Lorraine*, which was on the Calabrian side of the Straits, was slightly ported. That the *Rhondda* continued to port until she had just opened her port bow about a point or a point and a half on the port bow of the *Alsace Lorraine*. That the *Rhondda*, instead of continuing under a port helm, bore down upon the *Alsace Lorraine* at a great rate of speed, and, although the helm of the *Alsace Lorraine* was put hard aport, the *Rhondda* came into collision with her, striking with the stem her port side amidships, and doing her so much damage that she sank in a few minutes, and with her cargo was lost.

The case on behalf of the *Rhondda* was, that after that vessel had rounded Faro light, under a port helm, and was heading south-west half-south, those on board her suddenly saw the red and masthead lights of the *Alsace Lorraine* about half a mile off, and about a point on the starboard bow, on the Sicilian side of the Straits, that her helm was immediately put hard aport, but that the vessel did not answer the helm, owing to a certain strong current. That her engines were at once stopped and reversed full speed, but that shortly afterwards the collision ensued, the starboard bow of the *Rhondda* striking the port side of the *Alsace Lorraine* amidships, considerable damage being caused to the *Rhondda*.

Each party charged the other with causing the collision and consequent damage, by the negligent navigation of their respective vessels.

The learned judge of the Vice-Admiralty Court decided that the *Alsace Lorraine* was being navigated, before and at the time of the collision, on the Sicilian side of the Straits, and that she therefore disobeyed the provisions of Article 21 of the said regulations. That there was a current at the time running through the Straits in a northerly or north-easterly direction. That this current prevented the *Rhondda* answering her port helm. That the

Rhondda did all she could to avoid a collision. That consequently the *Alsace Lorraine* was in fault for disobeying the said Article 21, and for not either "continuing her way unaltered or more to port as common sense and seamanship suggested," in accordance with Articles 23 and 24 of the Regulations, and he thereupon dismissed the respondent from the suit, and condemned the appellants in costs.

C. Russell, Q.C., and Dr. *Phillimore* (Dr. *Stubbs* with them), for the appellants, referred to the Regulations (1), Arts. 16, 18, and 21, and contended that the Court below was wrong in ruling that the *Alsace Lorraine* infringed Art. 21. For a case of collision in a narrow channel see *The Panther* (2). In this channel fleets could pass abreast. The *Alsace Lorraine* was right in porting when she did, and it was not her duty to starboard. The *Rhondda* did not keep a proper look-out, tried to port her helm, waited till the port helm failed, and then gave the order to the engines. Whatever might be said as to other parts of the case she was clearly to blame for not stopping and reversing at the first risk of collision: *The Byfoged Christensen* (3); *The Khedive* (4).

SIR JAMES HANNEN:—Their Lordships will hear the respondents upon two points, whether the *Rhondda* was to blame for not seeing the *Alsace Lorraine* before, and for not stopping and reversing her engines directly she did see her.

Webster, Q.C., and *Raikes*, for the respondent, referred to the evidence on the former point, and cited *The William Frederick* (3) and *The Earl of Elgin* (5) on the latter.

Dr. *Phillimore* replied.

The judgment of their Lordships was delivered by

SIR JAMES HANNEN:—

The first question to be considered in this case is whether or not the Strait of Messina is a narrow channel, which makes it the

(1) 4 P. D. 248.
(2) 1 Spinks, 31.
(3) 4 App. Cas. 669.
(4) 5 App. Cas. 880.
(5) Law Rep. 4 P. C. 1.

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duty of a vessel passing along it to keep to its own starboard side. Their Lordships do not propose to define what is a narrow channel, or to lay down what particular width or length will constitute it. It is sufficient to say that they are of opinion that this is a narrow channel within the meaning of Art. 21 of the Regulations for preventing Collisions at Sea allowed by Her Majesty in Council on the 18th of March, 1880, and that they concur in the opinion which the learned judge in the Court below has expressed upon that point.

It has not been suggested that there were any circumstances which would excuse the departure from the rule if it be applicable. But the contention in the Court below was that there had not been an infringement. The whole case evidently proceeded upon a consciousness on the part of those on board the *Alsace Lorraine*, that, to establish that they were not to blame, they had to prove that she was keeping along the Calabrian coast; but their Lordships concur with the learned judge of the Court in Malta, that this contention has not been established, and that the evidence is really overwhelming that the course of the *Alsace Lorraine* was along the Sicilian shore, and therefore that she infringed the rule contained in Art. 21, without which infringement on her part the accident could not have happened. It follows, therefore, that the onus is upon the *Alsace Lorraine* to prove that those on board the *Rhondda* were wholly or partly to blame.

It was contended on behalf of the appellants that if the *Rhondda* had kept a good look-out she ought to have seen the *Alsace Lorraine* sooner than she did, and that if she had done so the accident might have been avoided; and they complain that the learned judge in the Court below did not deal with this point; but it does not appear that it was ever insisted upon in the Court below. If the appellants had intended to raise that point, questions should have been put and an opportunity given at the trial to the opposite party to remove any doubt, if any doubt existed upon the subject. Their Lordships are of opinion that the fact that the *Alsace Lorraine* was not seen by the *Rhondda* across the neck of land to the west of Faro may be dismissed from consideration, as it is probable that when the *Alsace Lorraine* had passed over from Pezzo Point to Sicily and was close under the shore it

would be impossible that its lights should be seen by the *Rhondda*. It is, however, admitted that the *Rhondda* did not see the *Alsace Lorraine* until she herself had rounded or was round—the phrases differ—the Faro Point; and the question is whether there was negligence on her part in this respect.

Questions have arisen as to the exact position of the two vessels at the time when they first saw one another. Both the captain and the man at the helm of the *Rhondda* speak of the white light of the *Alsace Lorraine* being mixed with the lights of Messina; and if a line be drawn from some point of that considerable tract which may be included in the general name of Messina (there may be lights along a considerable extent of coast, and we do not know what particular lights they refer to), that would bring the *Rhondda* to a point somewhat to the north-west of the position in which she is roughly indicated to be by the drawing upon the chart. That, however, is so entirely out of any proportion that it affords but a very uncertain guide. There can be no doubt that the *Rhondda* was coming round under a port helm, otherwise she could not have got into the position in which the witnesses for the *Alsace Lorraine* allege she was; and, assuming her to be on a line drawn from Messina past the coast and beyond Capo di Faro at half a mile outside the Faro light, as it is said she was, and putting the *Alsace Lorraine* at the same distance, not exceeding half a mile, on the other side, it would make them a mile distant at the time when they first sighted one another. That distance would not be traversed in a straight line, and therefore it would give more than a mile to be travelled, but, extending it even to a mile and a half, it does not give a space which would take any very considerable time for these vessels to cover, having regard to the speed at which they were going, one of them at the rate of nine miles an hour and the other six. Now here is the positive statement of the captain of the *Rhondda*, supported by the evidence of the helmsman and of the chief mate, that, as soon as the *Alsace Lorraine* was seen emerging from the Faro point, the process of porting the helm of the *Rhondda* was ordered, and was carried out. The explanation given by Stevenson, the captain, is contained in these words: He says, "She appeared to be coming out from the land, as she was too

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close to the land of Sicily." Silly, the helmsman, is asked, "How was it you did not see the other steamer's lights before?—(*A.*) Because, I suppose, she was steaming very close to the Sicily coast. We did not see her lights before we rounded the Faro Point." That is the evidence given by them, which was accepted by the learned judge below. He found that as soon as the *Alsace Lorraine* became visible to the *Rhondda* the order to port the helm was given, and that it was carried out; and their Lordships are not in a position to hold that he arrived at an incorrect conclusion.

Now if that was the order given, and if that order was so carried out, was it a wrong manœuvre? It was not suggested in the Court below that it was a wrong manœuvre. The case presented and maintained by Lelièvre was that the accident happened because the *Rhondda* did not continue to port her helm. That is his contention. He says that she was under a port helm; that she ought to have continued so; and that if she had been so, there would have been no accident.

Now, in answer to the questions which were put to the experts, and which form part of the record, they say, in the state of things which existed, or appeared to exist, when the *Rhondda* saw the *Alsace Lorraine* coming out from the Faro Point and shewing her red light, it was the duty of the *Rhondda* to keep out of the way; and that, of course, is obvious under the rule. They further say that there was time to do it. So, no doubt, there would have been unless some obstacle had arisen. Further they say that she might have reversed in three minutes and in the distance of a mile. That will be dealt with presently. Then they say that at the time when she discovered, if it be true that she did discover, that she was not obeying her helm, it would have been impossible for the collision to be avoided by the *Rhondda* going round to her own port side; but that it was the duty of the *Rhondda*, when a risk of collision arose, to slacken or stop and reverse. The contention on the part of the *Rhondda* is that this is precisely what she did; and their Lordships are of opinion that this is established.

The next question is whether or not the *Rhondda* failed by her own fault to keep out of the way of the *Alsace Lorraine* under the 16th Article; and that, no doubt, was the substantial question as

to the conduct of the *Rhondda* which was contested in the Court below. Lelièvre says: "As soon as the *Rhondda* saw our manœuvre she ought to have starboarded, that is, gone to the starboard and passed astern. If the *Rhondda* had continued her way without deviation, she would have avoided the *Alsace Lorraine*, but she made a movement to port, and that caused the collision." He goes so far as to say, that not merely was there a cessation to keep the course round, but that she actually went the other way, which might be the effect of the current, if in fact it was strong enough to push her in that direction. The evidence of Stevenson, Silly, Bray, and Hookey shews that the order to hard-a-port was given, and that no other order was given, but that, in fact, it did not take effect. Now, if that evidence is to be relied upon—and the learned judge had the opportunity of seeing these witnesses and hearing the manner in which they gave their evidence, and their Lordships cannot say that he was not justified in believing their evidence—that disposes of the case; because if once it is established that the order to port was given, and that if it had been carried out it would have taken the *Rhondda* clear of the *Alsace Lorraine*, then, if the *Rhondda* was prevented from carrying out that manœuvre, it becomes merely an interesting speculation what the actual cause was. Undoubtedly it was strongly in evidence that there was such a stream at this place, whether it be called current or eddy, and that it was calculated to have an effect in the manner suggested on a vessel coming round into the neck of the channel. It is easy to conceive, when one looks at the conformation of the coast, that this current would be deflected by the Faro Point, and would be felt upon the starboard bow of a vessel precisely at the point where the *Rhondda* had arrived. There is the statement that this did take place. If it be the fact that it took place, which must depend, of course, upon the veracity of these witnesses, it remains only for the experts to reconcile their theory with the fact, and the fact cannot be displaced by their theory. Their Lordships are of opinion that there was abundant evidence in support of the conclusion the Court did arrive at, that there was a current or eddy which had the effect on the action of their vessel alleged by the witnesses on board the *Rhondda*.

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But it is further contended that precautions ought to have been taken by the *Rhondda* to avoid this current, or whatever it is to be called, because it is found noted in the charts, and must be taken to be a thing that persons navigating this channel ought to have in their contemplation. But there is nothing to shew that, under ordinary circumstances, there would be any risk in a vessel coming round there. The current and the eddy are variable. Nobody can tell for certain that they will be felt at a particular place; and, above all, the *Rhondda* had no reason to anticipate that the operation of the current or eddy would have any bearing upon her duty with reference to the *Alsace Lorraine*, because she had a right to expect that the coast would be clear from steamers coming out in the direction in which the *Alsace Lorraine* was.

Then, further, it is said that at any rate she violated her duty in not reversing her engines sooner. The vessels were about a mile apart from one another when first sighted. As they were meeting, she would not have so much as a mile to go to come to the point of collision. Her engines were reversed, which it appears would take from two to three minutes. It appears that they had already been completely reversed, so that twelve revolutions had been taken at full speed astern, and therefore that shews that for a very considerable portion of the time we are now dealing with the order had been given to reverse her engines, and that this order had been complied with, since her engines were actually going astern at the time of the collision. Then, if this be so, all the time that has to be accounted for is the short period between seeing the *Alsace Lorraine* and the order being given that the engines should be reversed. The reason given for its not having been done sooner is, that it was not until the captain found that the vessel was not obeying her helm that he became aware of the necessity of taking this step of reversing the engines. Their Lordships are of opinion that if that was the fact, as they, with the learned judge below, came to the conclusion that it was, then no blame can be imputed to the captain of the *Rhondda* for not having stopped and reversed sooner.

Upon this point, the case of *The Khedive* (1) has been referred to;

(1) 5 App. Cas. 880.

but it will be found that it is not applicable to the present case. By that decision the wholesome rule was laid down that where one of these regulations has prescribed something to be done, the captain of a vessel who departs from it will not be justified merely by its being thought that a man of ordinary skill and nerve would do as he did; if he sees there is danger of collision then it is his duty to obey the rule. In that case it was thought to be clear that the captain did see there was danger of collision, and therefore that he could not be excused for not having obeyed the rule. But Lord Blackburn points to the state of facts which, as had been found by the learned judge below and their Lordships also found, existed in this case, for he says: "I think, farther, that where a sudden change of circumstances takes place which brings a regulation into operation, though the thing prescribed by the regulation is not done by the person in charge, yet the regulation can hardly be said to be infringed by him till he knows or ought to have known, and but for his negligence would have known, of the change of circumstances" (1). Lord Watson says, to the same effect:—"Had it been possible to hold upon the evidence that the period in question was so brief, and the *Voorwart's* sudden change of course so startling, that the captain could not be fairly expected to suppose, and did not believe the fact, that a collision was imminent before he gave the order to stop and reverse, I should in that case have acquitted the *Khedive* of fault, on the ground that the 16th Article could not reasonably be held to apply before the moment at which it was actually obeyed." That is the state of facts which their Lordships are of opinion existed here. The captain gave the order to hard-a-port. If the ship had obeyed her helm she would have been taken clear, and no collision would have taken place. It was only when the captain discovered that his vessel was not obeying her helm that the risk of collision appeared to him, and it was only then that it became his duty to stop and reverse; and that is precisely what he says he did, and what the fact of the engines being already working in the opposite direction when the collision took place proves he had done at a period of two or three minutes before the collision took place.

(1) 5 App. Cas. 894.

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With regard to the case of *The Earl of Elgin* (1), the marginal note very plainly shews that it is in no way an authority against the view that has been presented in this case: "Article 16 of the Admiralty Regulations for preventing collisions at sea only applies when there is a continuous approaching of two steamships. When two ships under steam 'are meeting end on or nearly end on, so as to involve risk of collision,' as provided for in Article 13, and one of them at a proper distance ports her helm sufficiently to put her on a course which will carry her clear of the other, and enable her to pass on the port side, she thereby determines the risk, and is not approaching another ship so as to involve risk of collision within the meaning of Article 16, and is not bound to slacken speed or stop." Applying that ruling to this case, when the *Rhondda's* helm was put hard-a-port, that manœuvre, if it had been successful, would have put her on such a course as would have determined the risk, and therefore the duty of slackening speed did not arise. It only arose when it was discovered that this manœuvre could not be carried out.

Adopting this view of the case, it becomes immaterial to consider the other measures of the *Alsace Lorraine* which were taken after her sighting of the *Rhondda;* because their Lordships are of opinion that it is established that the *Alsace Lorraine*, by proceeding along the wrong side of the channel and coming out suddenly from under the land on that side, occasioned the collision which afterwards happened, and that she has failed to establish that the *Rhondda*, by anything she did, contributed to it, or could in any way have avoided it, but that she was prevented from doing that which would have avoided the collision by the action of the current or eddy upon her in the manner which has been described by the several witnesses.

Their Lordships are therefore of opinion that this appeal should be dismissed with costs; and they will humbly advise Her Majesty to that effect.

Solicitors for appellants: *Stokes, Saunders, & Stokes.*
Solicitors for respondent: *Waltons, Bubb, & Walton.*

(1) Law Rep. 4 P. C. 1.

[PRIVY COUNCIL.]

WILLIAM BIRD AND OTHERS . . . . . DEFENDANTS; J. C.*

AND 1883

THOMAS GIBB AND OTHERS . . . . . PLAINTIFFS. *May* 29, 30, 31; *June* 30.

THE "DE BAY."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF MALTA.

Salvage Remuneration—Ascertainment of Salvor's Losses.

Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual.

The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision.

Where a judge had awarded £3500 for losses and £5000 for remuneration (the property saved being £67,000):—

Held, that a total of £6000 was sufficient.

APPEAL from a judgment or sentence of the Vice-Admiralty Court of Malta (30th June, 1882), in a cause of salvage promoted in that Court by the respondents against the steamship *De Bay* and cargo and freight.

The facts are stated in the judgment of their Lordships.

The judge awarded £3535 1*s.* 6*d.* for loss and damages and £5000 for remuneration over and above, making in all £8535 1*s.* 6*d.* The items shewing damage and expenses were as follows:—

	£	*s.*	*d.*
Demurrage from 14th of December, 1881, day on which *Mary Louisa* took *De Bay* in tow to that of her departure from Malta 31st of same month, 17 days at £40 per day	680	0	0
Depreciation in *Mary Louisa's* value by over-straining, racing of engines, &c., £30,000 at 5 per cent.	1500	0	0

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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	£	s.	d.
Loss on charter commission on freight, &c., as per documents	390	0	0
Cancelling charter and Lord Mayor's fees as per documents exhibited	4	16	7
Cost of repairs and expenses in Malta as per account	645	5	8
Cost of bosses left to be replaced in England about	200	0	0
Sundry telegrams about	12	0	0
Six months' interest on the above items amounting to £3423 2*s.* 3*d.* at 6 per cent. per annum . .	102	19	3

Webster, Q.C., and Dr. *Phillimore* (*J. G. Alexander* with them), for the appellants, contended that this amount, £8535, was so large as to be excessive and unreasonable. There is no authority for saying that the ordinary ship's expenses incurred in the early salvage operations should be considered, as for instance wages for the crew and expenditure for coal. Though delay is considered, demurrage is not allowed. Loss by charterparty should not be considered. Reference was made to *The Cybele* (1); *The Martha* (2). It is an erroneous principle first to estimate losses and then add to the amount so ascertained a further sum for salvage services. Salvage was originally considered as compensation for the personal skill and services of those engaged; the reward to the owners was subsequently introduced because of the risk which the ship ran. See *The Enchantress* (3); *The Star of India* (4); *The Ellora* (5).

Cohen, Q.C., and *Aspinall*, for the respondents, contended that the *De Bay*, cargo, freight, and passengers, had been rescued from a total loss, and that the sum awarded was not exorbitant. The objections to the items had not been taken in the Court below. For the principle which should govern salvage remuneration, see Williams and Bruce on the High Court of Admiralty, p. 115, note. Salvage services are peculiar, if not successful there is no reward and therefore the award should be liberal. Reference was made to *The Lancaster* (6); *The Kenmure Castle* (7); *The City of*

(1) 2 P. D. 224.
(2) 3 Hagg. 434.
(3) Lush. 93.
(4) 1 P. D. 466.
(5) Lush. 550.
(6) 8 P. D. 65.
(7) 7 P. D. 47.

Chester (1); *The Celtic Monarch* (2); *The Amérique* (3); *The Cuba* (4); *The Chetah* (5); *The Saratoga* (6); *Scaramanga* v. *Stamp* (7).

Newson, for some of the crew of the *Mary Louisa*.

Dr. *Phillimore* replied, citing *The Farnley Hall* (8).

The judgment of their Lordships was delivered by

SIR J. HANNEN :—

The *Mary Louisa*, a new steamer of 1287 registered tonnage, with engines of 200 horse power, and a crew of twenty-six hands, left Marseilles on the 11th of December, 1881, in ballast, bound for Girgenti, in Sicily, under charterparty, to load from that and other ports a cargo of fruit for New York or Baltimore. At 8 P.M. of the 30th Cape Granitola, in Sicily, was sighted, and at 10 P.M. three vertical red mast-head lights of a steamer were seen on the starboard bow, the signals indicating that she had broken down, and rockets were also being fired from her. This steamer proved to be the *De Bay*, which had lost her propeller, and was heading towards the coast of Sicily at a distance of about 10 miles.

The *De Bay* was a screw steamer of 1085 tons register, of 160 horse power, and a crew of thirty-seven hands, with a general cargo, and five adult passengers and three children, bound for Rangoon. The master of the *De Bay* requested to be towed to Malta. The master of the *Mary Louisa* hesitated, as he would thereby be deviating from his voyage to Girgenti, then nearly accomplished, and might forfeit his charterparty; but in consideration of the risk to the *De Bay*, and the lives of those on board of her if assistance were not given, he ultimately consented to take the *De Bay* in tow to Malta.

At 2.30 A.M. of the 14th the towage commenced, a steel hawser from the *De Bay* and a new thirteen-inch Manilla rope of the *Mary Louisa* being used. The wind gradually increased to a

(1) Mitchell's Maritime Register, Jan. 1881.
(2) Ibid.
(3) Law Rep. 6 P. C. 468.
(4) Lush. 14.
(5) Law Rep. 2 P. C. 205.
(6) Lush. 318.
(7) 5 C. P. D. 295.
(8) 4 Aspinall, 499; 46 L. T. 216.

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gale, causing great difficulty in the towing; and ultimately, at 3.20 P.M. of the 14th, the steel hawser parted, and soon after the Manilla tow rope also gave way, and great danger arose of the propeller of the *Mary Louisa* becoming fouled in the hawsers. It was impossible to renew the towage that afternoon, and the *Mary Louisa*, at the request of the *De Bay*, endeavoured to remain by her during the night; but in consequence of the violence of the storm the vessels lost sight of one another. At 9 A.M. of the 15th the *Mary Louisa*, which had been in search of the *De Bay*, again sighted her, and at 10.45 came up with her. The steel hawser and Manilla rope were again made fast, and the towage was resumed; the steel hawser, however, parted, and the towage was continued with the Manilla hawser throughout the rest of that day and the following night; and on the 16th, at 5 P.M., the two vessels arrived at Valletta.

The services thus rendered to the *De Bay* lasted altogether during a period of sixty-two hours. In the earlier part of this time these services were rendered in circumstances of great difficulty and some danger, and during the twenty hours in which they were interrupted the *Mary Louisa* shewed great perseverance in standing by the *De Bay*, and seeking her in order to renew the efforts for her assistance.

The agreed value of the *De Bay*, her cargo and freight, is £67,000.

A suit for salvage was instituted by the *Mary Louisa* in the Admiralty Court at Malta against the *De Bay*. The Court was assisted by two experts, Captain Keston, chosen by the plaintiffs, and Captain Dyer by the defendants.

Captain Keston places a much higher estimate than Captain Dyer does on the value of the services rendered by the *Mary Louisa* to the *De Bay*, but Captain Dyer stated that in his opinion "the service rendered by the *Mary Louisa* to the *De Bay* was most important and valuable, being conducted with much perseverance." He further says, "The captain and crew of the *Mary Louisa* should be well considered, for they shewed much perseverance in sticking by the *De Bay*, and they had a most trying and anxious time throughout." Captain Bird, in a declaration made before a notary, on the 21st of December, stated that the

Mary Louisa prolonged her voyage and suffered considerable damages consequent on the services rendered, and that his own vessel was in a perilous condition, being unmanageable and near the land and reefs." Upon this and other evidence in the cause their Lordships think that the judge was well warranted in finding that the *De Bay* and her cargo, crew, and passengers were "rescued from a serious danger of total loss, though without any serious danger incurred by the *Mary Louisa*." For these services the learned judge awarded the sum of £8535 1s. 6*d*.

It was objected on behalf of the Defendants that this sum is excessive, and the decision of the learned judge was specially impugned, on the ground that he has allowed the specific amount of £3535 1*s*. 6*d*. for the damage, losses, and expenses alleged to have been incurred by the *Mary Louisa*, to which he has added £5000 for salvage services. The particulars of the damage, losses, and expenses are given above (see ante, p. 559).

It was contended that some of these items ought not to be taken into consideration at all, as, for instance, the loss on charter; and it was further contended that in no case ought the items of loss or damage to the salving vessel to be allowed, as "moneys numbered," but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration.

Their Lordships are of opinion that this objection is not well founded. It was argued that, by allowing the several items of the account, and then a further sum for salvage, the salvors would receive payment for their losses twice over, but this is only on the supposition that the Court below, after giving the amount of the alleged losses specifically, has considered them again generally in awarding £5000 for simple salvage services. It is not to be presumed that the learned judge has fallen into such an error, and, indeed, it appears that he has not done so, but that he considered the £5000 a reasonable amount for salvage reward, wholly irrespective of damage and expenses.

Their Lordships are of opinion that it is always justifiable and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and expensive,

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and sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses, and to afford also an adequate reward for the services rendered. In the assessment of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage service to secure to him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and, in addition to this, the salvor should receive a compensation for his exertion and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual; for, if no more than a restitutio in integrum were awarded, there would be no inducement to shipowners to allow their vessels to engage in salvage services. If there be a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their Lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically.

There are several reported cases in which the Court of Admiralty has, besides awarding salvage services, decreed payment of damage and losses sustained by the salvor, and has directed them to be ascertained and reported on by the Registrar and merchants. *The Salacia* (1); *The Oscar* (2); *The Watt* (3); *The Saratoga* (4).

Their Lordships are, therefore, of opinion that the learned judge below has not adopted an erroneous principle in first estimating the amount of loss sustained by the *Mary Louisa*, and then adding to it an amount for salvage services, but their Lordships are not prepared to accept all the items of loss which have been allowed in the Court below.

For example, their Lordships do not consider that the loss on

(1) 2 Hagg. 270.
(2) 2 Hagg. 261.
(3) 2 Wm. Rob. 72.
(4) Lush. 322.

charterparty was established by the evidence. This item as to £200 appears to have been arrived at by simply deducting the difference of freight payable under the substituted charterparty which the *Mary Louisa* obtained, from that which she would have received under the one which she lost. But these charterparties were for different voyages and under different conditions. The sum to be paid under the original charterparty included remuneration for proceeding from Marseilles to Girgenti in ballast, which the *Mary Louisa* had not to do under the second charterparty. With the exception of the loss of commission on the freight under the first charterparty, which is alleged to have been paid, though the proof of this loss is not very satisfactorily established, there is nothing to shew that the second charterparty was not as profitable as the first.

Their Lordships think that the item of interest ought not to have been admitted, and there are other items in the account which their Lordships would feel disposed to disallow if the matter were now being investigated for the first time before them, but no objection appears to have been taken to these in the Court below, and they do not in their aggregate amount to a sufficient sum to warrant the variation of the judgment appealed from. It is only where the amount awarded is grossly in excess of what appears to be right that their Lordships would feel justified in overruling the decision of a Court below on a question of salvage.

There is one item, however, of the claim for losses which calls for special notice; it is the sum of £1500 for general depreciation of the *Mary Louisa*. Their Lordships consider this a very large amount to allow for the depreciation of the vessel beyond the damage actually ascertained and repaired at Malta. This sum was arrived at on the assumption that the overstraining of the vessel and racing of the engines during the towage would be equivalent to six months' ordinary wear and tear of the vessel.

Captain Keston was disposed to fix it at a higher amount. Mr. Hinchcliffe, a surveyor called for the plaintiff, fixed the amount of general depreciation at five per cent. Captain Baines, another surveyor, stated that the general depreciation would amount to four or five months' wear and tear, or, at the utmost, six months.

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Captain Dyer ultimately joined with Captain Keston in reporting that the explanation given at a conference they had with the surveyors allowed them to come to the conclusion that the wear and tear might amount to five per cent., which, upon the estimated value of £30,000, would give £1500.

It appears, therefore, that it was not disputed by the defendants, and it seems probable, that some depreciation of the ship beyond the damage which could be actually seen would arise from straining, and upon the evidence before the Court at Malta, their Lordships are not in a position to hold that the sum of £1500 awarded was grossly excessive, still less to hold that the claim for general depreciation should be altogether disallowed.

But, while their Lordships are of opinion that the learned judge has not erred in the principle upon which he has based his judgment, and that the amount which he has allowed for loss and damage is not so excessive as in itself to call for an alteration of the judgment, it is obvious that when the claim of loss, damage, and expenses have been ascertained and allowed, as in this case, with assumed exactness, the rate of salvage remuneration pure and simple to be allotted in addition must be estimated on a more moderate scale than where the amount of losses, &c., cannot be fixed with precision, and their Lordships are of opinion that, in awarding the sum of £5000 in addition to the estimated losses, the learned judge has adopted too high a standard of remuneration, and that the amount ought to be reduced. Their Lordships have the less hesitation in diminishing the amount awarded as they are able to see that the learned judge has proceeded upon what their Lordships consider an erroneous view of the evidence with regard to this sum of £5000.

The *Mary Louisa* arrived in Valletta on the 14th of December. On the 17th she was surveyed by Messrs. Hinchcliff & Stacey for the plaintiffs, and they gave a written report in which, in addition to the specific damages they pointed out, they state that the vessel was much strained and damaged in decks and upper works by the heavy work she had done. After this survey the two captains had a conversation, in which Captain Bird, the captain of the *De Bay*, asked Captain Gibb, the master of the *Mary Louisa*, "what he thought would be a reasonable compensation for what

he had done." Captain Gibb replied, "Do you think £5000 remuneration would be unreasonable?" Captain Bird said, "Not at all, I think it very fair indeed," and on the 20th of December he telegraphed to his owners: "*Mary Louisa* amicably demands £5000; considering important salvage rendered, amount reasonable. Wire instructions."

The learned judge observes upon this evidence that he thinks that this must have been meant to be only for the reward and not including the expenses, because it does not appear that on the 21st, when the conversation took place and the telegram was forwarded, they had any knowledge of what the expenses would come to, and that he cannot believe they would have seriously made to their respective owners a proposal of £5000 intended to cover a loss exceeding £3500, leaving for apportionment a sum less than £1500. Their Lordships are of opinion that although the captains did not know the exact amount of the damages, they knew their general nature, and that they did intend the £5000 to include the whole claim. As this was never agreed to it was not binding either on the parties or on the Court, but the learned judge appears to have taken it as a fair amount to be awarded for salvage in addition to expenses, because, he says, he "did not think that there was reason for reducing the sum which Captain Bird declared in his opinion was a fair and reasonable proposal."

Their Lordships think that this is not the true construction of Captain Bird's language and telegram, and therefore that undue weight has been given to the supposed agreement of the captains. Taking all the circumstances into consideration, their Lordships are of opinion that £6000 is a sufficient amount to award, and they will humbly advise Her Majesty that the judgment should be varied by reducing it to that amount.

Each party will bear his own costs of the appeal.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Pritchard & Sons.*

[PRIVY COUNCIL.]

J. C.* 1883 June 12, 30.

MOTT AND OTHERS . . . . . APPELLANTS;

AND

LOCKHART AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Nova Scotia Revised Statutes, 4th Series, c. 9 — Right to lease — Priority of Application.

Nova Scotia Revised Statutes 4th Series, c. 9, contemplates the grant of both licenses and leases in all districts whether proclaimed or unproclaimed. The first applicant, whether for a license or a lease, is entitled. Applications must be made in writing to the Commissioner or Deputy-Commissioner. A licensee is entitled to a lease under sect. 42. "Occupying and staking off" is not a condition precedent to all leases in an unproclaimed district.

APPEAL from a judgment of the Supreme Court (May 1, 1882) whereby a decision of the Commissioner of Mines (May 19, 1881) was reversed.

The Commissioner of Mines decided that the respondents were not entitled to a lease of the gold mining areas applied for by them, and that a lease should issue to the appellants of the areas applied for by them. The areas applied for by the respondents and appellants respectively covered, to a great extent, the same ground. The Supreme Court reversed this decision, and were of opinion that the applications of the respondents under sect. 33, c. 9, Revised Statutes, 4th Series, should have been entertained in the office of the Commissioner of Mines, and should not have been rejected, and that the appellants had failed in shewing any rights under which a lease should have been granted, and sustained the appeal with costs.

The gold mining areas in dispute are situated near the Salmon River, East Halifax, and the rights of applicants for such areas are governed by an Act passed in the year 1879, and called "An

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

Act to consolidate the Statutes relating to Mines and Minerals," c. 9 Revised Statutes, 4th Series. The Salmon River district is not a proclaimed gold district.

The facts of the case appear in the judgment of their Lordships.

Bray (Sir *Farrer Herschell*, S.G., with him), for the appellant.

Wood Hill (*Cohen*, Q.C., with him), for the respondent.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

The proceedings which gave rise to this appeal were commenced in the Court of the Commissioner of Public Works and Mines, who gave judgment on the 19th of May, 1881, in favour of the appellants. On the 1st of May, 1882, the Supreme Court of Nova Scotia reversed that judgment, and their decision is now under appeal.

The appellants and respondents are rival applicants for leases of blocks of land which to a certain extent overlap one another, and the point to be decided is, which of the claims has priority over the other. There have been some changes of interest since the dispute began; but they are not material to the present question, and in stating the facts it will suffice to speak of the appellants and respondents as though there had been no change of interest or person.

On the 2nd of September, 1880, the appellants applied to the Commissioner for prospecting licenses over six blocks of land in a district not proclaimed as a gold district. No prior application had been recorded for any part of these blocks. The applications of the appellants were received and recorded, and the statutory payments were made by them. No licenses were issued, but on the 6th of September the appellants, acting as though they were licensed, began to work the ground. On the 18th or 19th of October they discovered the lead or lode of gold. In the month of November they applied to the Commissioner for leases of three of the blocks. Again their applications were received and recorded, and their money taken, but no lease was actually issued.

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In the same month they applied for a renewal of license over another of the blocks, and on the 1st of March, 1881, for a lease of the same block; and the proceedings on these applications were the same as the proceedings on the former applications. Two of the six selected blocks have been abandoned. But as regards the other four, the appellants worked them without interruption or question until about the end of March, 1881, and got a substantial quantity of gold from them.

It appears from the evidence of Mr. Carman, chief clerk in the Mines Office, that the non-issue of licenses was a common thing. As to the non-issue of leases, that, Mr. Carman says, was due to the pressure of business in the office.

On the 9th of September, 1880, the respondents went to make application for a lease of a block of land covering portions of the appellants' block. What passed on that occasion may be stated from the cross-examination of Mr. Lockhart:—

"Next morning I appeared at the Mines Office. Watson. Eaton, and his son William went with me, I went to put in an application for the ground I had staked. If the ground we had staked was not taken, we were going to apply for a prospecting license. If it was taken, we were going to put in our application under the 33rd section. I did not then have a copy of the Mines Act with me, but for some years back have known of the 33rd section. We were going to apply for a lease under the 33rd section. Mr. Eaton was writing out the application. No application was at that time written fully out. I asked Carman, when I went in office, if any claims were taken at Salmon River. He said there was. I asked if Archibald had taken them. He said, 'No.' His name was not in the office in connection with them. I asked who had taken claims there. He said Mr. Mott had taken 600 acres. He shewed us the application, and told us where it was described. I told him we were going to put in application for part of that ground we had staked under sect. 33, and I told him the reason why. He said he would not be justified in taking the application for that ground under that section, and would not do it. He did not understand that section himself, and did not think anybody else did. He was decided not to take our application unless we would guarantee

that it would not go on that ground of Mr. Mott's. I judged from the quantity of ground he had taken and the locality that Mott's application covered my ground, and I would not guarantee that mine would not cover it. The paper was not written out and completed because Carman would not take it. That was the only reason."

The respondents did nothing further until the 31st of March, 1881, when their solicitor, Mr. Eaton, wrote to the Commissioner as follows:—

"Hon. Samuel Creelman, Commissioner of Public Works and Mines.

"Sir, Halifax, 31st March, 1881.

"The applications hereto annexed are made under sect. 33 of the Mines Act, and are a repetition of applications made by the same applicants on the ninth day of September last and then rejected. I am instructed that they then distinctly claimed the benefit of the provisions of sect. 33, and that they were the original discoverers of gold-bearing quartz on the areas embraced in the annexed applications; that they were the first occupants thereof, and that their applications were made within the time allowed by said section. Their applications were rejected, as they instruct me, on the ground that said areas had already been applied for; and so positive was the refusal of their applications, and so confident and emphatic was the assurance of the chief clerk, to whom said applications were handed, that they had no claim or right to apply for the ground in question under the Mining Act, that the said applicants, until quite recently, were led to believe that they had lost all claim to said areas. Hence their delay in repeating the applications. Under the facts, however, which they have given me, and which they are prepared to substantiate, shewing, besides those already mentioned, that they had been fraudulently overreached by the applicant whose applications were received, I have advised them that their applications, in my opinion, ought to supersede those of all others in respect of said areas.

"Without further statement of facts at this time, I beg, on behalf of these applicants, that you will grant them an opportunity to testify and be heard in support of their claims, and

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that in the meantime you will withhold any lease or license of said areas from other parties now claiming.

"I have the honour to be, Sir,

"Your obedient servant,

"(Signed) B. H. Eaton,

"Solicitor of applicants."

The applications sent with this letter were two in number, each dated the 28th of March. Mr. Carman refused to receive them, writing on each that it was "refused, as it was stated by Mr. Eaton that it covered ground under application by Charles F. Mott." The Commissioner then tried the case, and decided that the lease of the areas in dispute should issue to the appellants.

The respondents have urged at their Lordships' Bar many grounds why the Commissioner should issue the lease to them. They say they were the earlier discoverers; but if they were, the statute does not annex any right to earlier discovery. They say that the appellants stole a march upon them, and violated some understanding with them; but if the fact were so, the Commissioner could pay no attention to it. He is the creature of the statute, and has no jurisdiction given him to enforce equities entirely outside of the statutory proceedings. They say that the appellants could not receive a license because they never gave a bond as required by the 39th section. But though it may be a breach of duty on the Commissioner's part to grant a license without the bond, it does not follow that such a license is void. And the appellants are not bound to shew that they were licensees. If they were applicants, that is sufficient to defeat a subsequent application by the respondents.

The Supreme Court decided in favour of the respondents on two main grounds. First, they held that the appellants obtained no title because the district was unproclaimed, and the appellants were not explorers for minerals, and did not occupy under sect. 33, or acquire under the clauses relating to unproclaimed districts. Secondly, they held that the respondents did acquire title because they occupied and staked off areas, and applied on the 9th of September in good time under sect. 33.

Their Lordships cannot quite follow the reasoning on which it

is held that the appellants obtained no title. As they read the statute, it contemplates the grant of both licenses and leases in all districts whether proclaimed or unproclaimed. The appellants were not tied down to apply for a lease under sect. 33. They might apply, and did apply, for licenses under sect. 35 and the subsequent sections. Nor is occupation and staking off a condition precedent to all leases in an unproclaimed district. Sect. 42 clearly confers upon licensees the right to have leases. The provision in sect. 33 as to parties occupying and staking off is evidently intended to lay down a rule of priority between persons resting their rival claims on the ground that they had occupied and staked off.

As regards the title of the respondents there are fatal objections. The Supreme Court have decided that they ought to succeed on their application of the 9th of September, 1880. But in the first place no application at all was made on that day. Applications must be in writing, and must be made to the Commissioner or Deputy Commissioner (sects. 14 and 15); whereas all that the respondents did was to mention their wishes to the clerk in the office, and to take his assurance that they were too late. If, however, there was an application, there was also a rejection of it, and then the respondents should have appealed. An appeal must, by sect. 84, be presented within twenty days. In effect the Supreme Court have entertained an appeal six months or more after the decision complained of.

The only effective application by the respondents was that of March, 1881. At that time the appellants were occupants of the disputed ground. Either they were lessees in substance and right, though not in form, which their Lordships think to be the sounder view; or their applications for leases were still pending. In either case the applications of the appellants could not, by the terms of sect. 14, be received.

The result is that their Lordships will humbly advise Her Majesty to reverse the decision of the Supreme Court, and to dismiss with costs the appeal from the Commissioner. The respondents must pay the costs of this appeal.

Solicitors for appellants: *Hill, Son, & Rickards.*
Solicitors for respondents: *Dawes & Son.*

[PRIVY COUNCIL.]

J. C.* 1883 June 30.

CANADA CENTRAL RAILWAY COMPANY . Defendants;

AND

THOMAS MURRAY and Others . . . . Plaintiffs.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Petition for Special Leave to appeal.

Petition for special leave to appeal in a case involving only an issue of fact refused.

Such petition must state fully but succinctly the grounds upon which it is based; the record not being before their Lordships until forwarded by the proper authorities.

THIS was a petition for special leave to appeal from a judgment of the Supreme Court (May 1, 1883), affirming a judgment of the Court of Appeal for Ontario (June 30, 1882).

F. W. Gibbs, Q.C. (*Kerr*, Q.C. of the Canadian Bar with him), for the petitioner.

The judgment of their Lordships was delivered by

Lord Watson:—

Their Lordships are of opinion that this application ought to be refused.

The case made by the petitioners, the railway company, is that they were not liable to the plaintiff, Thomas Murray, as having employed him to make certain fencing along the line. They allege that that contract was made with a gentleman of the name of Foster, who was not only a servant of the company, but a contractor with the company, dealing with them as an independent contractor. The judge put the question to the jury whether they were satisfied that the plaintiff contracted in the

* *Present*:—Lord Watson, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

belief that he was dealing with the company, and further put the question to them whether the company had fostered that belief and dealt with the plaintiff on the footing that they had contracted with him; and, in the event of the jury coming in point of fact to the conclusion that both those questions should be answered in the affirmative, he directed them that a verdict should follow for the plaintiff. The jury found for the plaintiff. The questions that seem to have been discussed in the Courts below may be said to be two: first, whether there was evidence to go to the jury at all making the petitioners parties to the contract by adoption or recognition; and in the second place, whether the evidence was sufficient to establish the fact that they had recognised or adopted the contract which was admittedly made by Foster with the plaintiff. There has been a difference of opinion in the Court below. The majority of the judges were of opinion that the verdict was warranted by the evidence before the jury, and the course taken by the judge was consequently not only justifiable, but right. The view taken by the minority of the Court was that there was no evidence to go to the jury upon that point, at least no evidence of a satisfactory description, and that therefore the verdict of the jury ought to be set aside, and judgment entered for the defendants.

Now the questions so raised appear to their Lordships to involve no issue except an issue of fact. The question before the Court was whether there was evidence in point of fact, and what was the effect of that evidence. That the judges below have differed upon a question of fact in regard to an ordinary contract of employment does not seem to be any reason for permitting an appeal, having regard to the terms of the statute which now regulates these appeals.

Their Lordships are also desirous in this case to lay down the rule that they will in future expect parties who are petitioning for leave to bring an appeal before this Board to state succinctly, but fully, in their petition, the grounds upon which they make that demand. They certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings, over which

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this Board, until an appeal is permitted and the papers are sent to England by the proper authorities, have no control, and which they cannot accept on an ex parte statement, which an application of this kind is.

Their Lordships will humbly report to Her Majesty that this petition ought to be dismissed.

Solicitors for appellant: *Wilde, Berger, & Moore.*

[HOUSE OF LORDS.]

STUDD . . . . . APPELLANT; H. L. (Sc.)

COOK . . . . . RESPONDENT. 1883 May 8.

Succession—English Will devising English and Scotch Lands in tail male, Effect as to Scotch Heritage—Construction—Intention of Testator—Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 *Vict. c.* 101), *ss.* 19, 20.

Where a testator, in a foreign will, expresses himself in technical language of the place where made and where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed.

By the common law of Scotland the actual intention of the maker of any validly executed settlement of moveables received effect when duly ascertained; and now by the Titles to Land Consolidation (Scotland) Act, 1868, the Scotch law—which would previously have rejected as inoperative a foreign will dealing with Scotch lands not executed with all the required formalities; and not expressed in appropriate terms of de presenti conveyance—must, so far as may be practicable with the principles of that law, give effect to the intention as expressed in the will, just the same as if it dealt with moveables and not heritage.

The technical rule of Scotch law applicable to moveable and immoveable property, that a gift or devise to a parent in liferent, and after his death to his unborn or unnamed children in fee, confers a fee on the parent and a spes successionis only on the children—(*Frog's Creditors*, Mor. 4262)—is excluded by anything in the gift itself, shewing beyond doubt that the intention was to give nothing more than a life interest to the parent.

A testator, domiciled in England, who died possessed of lands in England and Scotland, left a will executed according to the forms of English law, by which he devised all his lands as consisted of "freehold of inheritance" to the use of his eldest son, E. F. S., and his assigns for his life "without impeachment of waste," and after the death of E. F. S. to the use of the first and every other son of E. F. S. successively, according to their respective seniorities in tail male, with remainders over. Under a subsequent clause E. F. S. took as residuary legatee all property not otherwise disposed of. Subsequent to the date of the will children were born to E. F. S. He claimed the Scotch estate as vested in him absolutely, or alternatively that the estate belonged to him as residuary legatee or as heir-at-law. This claim was opposed on behalf of his infant children:—

Held, affirming the decision of the Court below, that under the statute of 1868 the law of Scotland must, so far as practicable, give effect to the intention of the testator, as gathered from the whole context interpreted by English law; and (2) that undoubtedly the intention of the testator was that E. F. S. should take a life interest only; and that the fee of

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the Scotch estates should go to the eldest son of E. F. S., and the others nominated. (3) That that intention, so far as the separate destination of the liferent and fee of the estate, could be carried out substantially without inconsistency with the practice or policy of the law of Scotland,—the rule being valeat quantum valere potest. (4) That a registrable title fell to be made up in accordance with such intention; but that the technical way in which effect might be given to the intention by the Scotch law was immaterial.

See Lord Watson as to the non-vesting of the beneficial fee until the death of the liferenter, p. 602.

APPEAL from the Second Division of the Court of Session, Scotland. The late Major-General Studd was a domiciled Englishman. At the date of his death in December, 1877, he was possessed of considerable landed property in England, and also was duly infeft as fee simple proprietor of the lands and teinds of the estate of Banchor, in the county of Inverness.

The deceased left a will dated the 21st of April, 1877, drawn by English conveyancers according to the forms of the law of England. Having appointed certain persons trustees the will proceeded as follows: "I devise all such and such parts of my manors, messuages, lands, and hereditaments, situated in the counties of Devon, of Inverness in Scotland, of Stafford, and of Warwick, and of my estates called the Four Dwellings, the Quinton, and the farm at Bell End, whether in Worcestershire or Staffordshire, or elsewhere, as consist of freehold of inheritance (which several hereditaments are hereinafter called "Edward's freehold estate") to the use of my elder son, Edward Fairfax Studd, and his assigns for his life, without impeachment of waste, and after the death of the said Edward Fairfax Studd to the use of the first and every other son of the said Edward Fairfax Studd, successively, according to their respective seniorities in tail male, with remainder to the use of my trustees during the life of my younger son, Alnod Ernest Studd, upon the same trusts as hereinafter declared concerning the real estate next hereinafter devised to my trustees, and called "Alnod's freehold estate," and after the death of the said Alnod Ernest Studd to the use of the first and every other son of the said Alnod Ernest Studd successively, according to their respective seniorities in tail male, with remainder to the use of the first and every other

son of the said Edward Fairfax Studd successively according to their respective seniorities in tail, with remainder to the use of the first and every other daughter of the said Edward Fairfax Studd successively according to their respective seniorities in tail, with remainder to the first and every other son of the said Alnod Ernest Studd successively according to their respective seniorities in tail, with remainder to the first and every other daughter of the said Alnod Ernest Studd successively according to their respective seniorities in tail, with remainder to the use of my said wife and her assigns during her life or until she shall marry again, without impeachment of waste, and after her death or marriage to the use of Marie Von Linsingen and Augusta Linsingen (the two daughters of my nephew, Count Linsingen of Hanover), and the child or children of the Reverend William Collett, of Hawstead, in the county of Suffolk, by his late wife, my niece, formerly Cecil Augusta Linsingen, their heirs and assigns, as tenants in common in equal shares."

Further the will gave specific powers to his eldest son to appoint a jointure to his widow and portions to his younger children, which were not to exceed in the whole £15,000, from which an eldest son was excluded: and also to grant leases under certain conditions and limitations not to be transgressed.

The will also set out that the testator devised all his copyhold and leasehold property in the said counties of Devon, Inverness, Warwick, Stafford, Worcester, and Hereford "upon such trusts and with and subject to such powers, provisoes, and declarations as shall correspond with the uses, trusts, powers, provisoes, and declarations hereinbefore limited, and declared of and concerning Edward's freehold estate, as nearly as the different tenure and quality of the hereditaments and the rules of law and equity will permit."

The will further contained a clause by which the testator devised and bequeathed all his property of every description, not otherwise disposed of by this will, unto and to the use of his trustees upon trust, to realise and turn into money such parts as did not consist of money, and should out of such moneys pay his debts, funeral and other expenses, legacies, and provide for annuities, and "shall stand possessed of the residue in trust

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for the said Edward Fairfax Studd, his executors, administrators, and assigns." The will then continued, "And I declare that my trustees shall have the fullest powers of determining what property passes under any specific devise or bequest contained in this my will, or any codicil hereto, and of apportioning blended trust funds, and of determining whether any moneys are to be treated as capital or income, and generally of determining all matters as to which any doubt, difficulty, or question may arise under or in relation to the exercise of the powers, or the execution of the trusts of this my will, or any codicil hereto." All the debts of the deceased E. M. Studd, and the legacies and annuities left by him, have been paid or provided for.

The estate of Banchor forms the only estate in Inverness-shire of which the testator died possessed.

The appellant, Edward Fairfax Studd, the eldest son of the testator, and his heir-at-law, instituted in March, 1880, this action against the trustees appointed under the above will and his own children born since the death of the testator. By this action he concluded for declarator that "the lands with the teinds of the said lands have vested to him in fee absolutely, and without any restriction or limitation whatsoever, in virtue of the conveyance or destination thereof contained in the said last will of his father the said Edward Mortlock Studd; or otherwise, and alternatively that the said lands and the teinds thereof fall under the residuary clause contained in the said last will, whereby the trustees are directed to hold the whole property of every description which the said Edward Mortlock Studd should at his death be seised or possessed of, and which was not otherwise disposed of by the said last will or any codicil thereto in trust, after payment of certain debts, legacies, and annuities for the pursuer, his executors, administrators, and assigns; and that all the debts, legacies, and annuities having been paid or provided for, the pursuer is now entitled to the same absolutely; or alternatively that the said Edward Mortlock Studd died intestate quoad the said lands and the teinds thereof, and that the right to the same has now vested in the pursuer as his heir-at-law.

The Lord Ordinary officiating on the bills, in respect that the defenders, Edward Arthur Studd and Gladys Studd, were in

pupillarity, appointed Mr. Charles Cook, W.S., to be curator ad litem, and he appears as the respondent in this appeal.

The pleas in law for the appellant were as follows:—

(I.) The devise or conveyance of such of the testator's manors, messuages, lands, and hereditaments situate in the county of Inverness, as consist of freehold of inheritance, being habile and sufficient to carry the said estate of Banchor with the teinds thereof, the destination thereof is not such as by the law of Scotland imports any restriction or limitation of the pursuer's right, and he is therefore entitled thereunder to the said estate absolutely in fee; or, (II.) Separatim, the language of the said special devise or conveyance being incapable of interpretation according to the law of Scotland, the said estate of Banchor, with the teinds thereof, falls to be dealt with as part of the residue of the testator's estate, and the pursuer is entitled thereto under the residuary bequest in his favour contained in the said will; or, (III.) Separatim, the said estate of Banchor and the teinds thereof are intestate succession of the said deceased Edward Mortlock Studd, and fall to the pursuer as his heir-at-law.

The pleas in law for the defenders, the trustees, and the respondent here, the curator ad litem, were as follows:—

(I.) The defenders, the trustees of the late General Studd, are bound, under the provisions of his last will, to make up a title in their own names to the estate of Banchor, with the teinds thereof, and thereafter to execute a deed of strict entail, settling the estate on the series of heirs prescribed in the said last will; or, (II.) Separatim, the right of the pursuer in the estate of Banchor, with the teinds thereof, being limited by the terms of the said last will to a right of liferent only, he is not entitled to decree, in terms of the first conclusion of the summons. (III.) The terms of the special devise or conveyance of the lands in Inverness-shire being effectual to convey the estate of Banchor, it does not fall to be dealt with under the residuary clause of the will, or as part of the testator's intestate succession.

The Lord Ordinary desiring explanations on various points, the parties, on the 1st of July, 1880, lodged in process a joint minute, which stated that the parties were agreed that according to the law of England—

First. The term "Freehold of inheritance" denotes an estate or right in lands which (as is the case with all lands in England) are held in fee of the Crown, or of a subject superior (to the exclusion of copyholds and leaseholds), and such that the estate or right is not merely for life or a term of years, but on the death of the holder, without having exercised such power of disposition as the law allows him, will descend to his heir-general, or the heir of his body, according as the estate is a fee simple or an estate tail.

Second. The devise of "Edward's freehold estate" "to the use of my elder son, Edward Fairfax Studd, and his assigns, for his life, without impeachment of waste," contained in the clause of Major-General Edward Mortlock Studd's

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will, quoted above—(1.) Conferred upon the pursuer, at the testator's death, an estate for life, without the intervention of trustees; and the incidents of that estate are generally—(2.) That, as such tenant for life, the pursuer is entitled to possession, both natural and civil; and by virtue of the Settled Estates Act, 1877, sect. 46 (re-enacting the provisions of an earlier Act), he can of his own authority let leases for agriculture or occupation (subject to conditions imposed by the Act), for a period not exceeding twenty-one years: (3.) That in virtue of the clause "without impeachment of waste," he may cut timber in a husbandmanlike manner for his own benefit, and open mines, quarries, and the like, as well as work existing ones, and permit buildings, fences, and the like to dilapidate with impunity; but may not wantonly pull down houses or fell ornamental timber, or commit other injury of a like nature; and—(4.) That he is entitled to convey away or assign absolutely his life estate, and that it can be attached by his creditors, and on bankruptcy or liquidation, by arrangement, his life estate passes to his trustee in bankruptcy or liquidation.

Third. The devise contained in the same clause, "After the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively, according to their respective seniorities, in tail male, with remainder to the use of my trustees during the life of my younger son, Alnod Ernest Studd, &c.—(1.) Confers upon the eldest or only son of the pursuer, on the birth of such son, a vested estate or interest, as tenant in tail male, which will take effect in possession on the death of Edward Fairfax Studd, unless such estate in tail mail has previously come to an end by the death of the son without leaving issue male. This estate cannot be disappointed by the act of the pursuer, or by his creditors. The second and every subsequent son of Edward Fairfax Studd takes a like estate, but always in remainder expectant on the death and failure of issue male of the elder son or sons; and on failure of all sons and their issue male, the trustees of General Studd take an interest for the life of Alnod Ernest Studd: (2.) On any son of the pursuer attaining the age of twenty-one years he will be in a position (subject and without prejudice to the estates and interest prior to his own) to bar the entail, i.e., to disentail by the execution of a deed (which must be enrolled in Chancery). Such deed will be effectual not only against his own issue, but also against the remainder men or substitutes, if the deed be executed after the death of the pursuer, or if the pursuer be a consenting party thereto. But if executed in the lifetime of the pursuer without his consent, it will only be effectual to bar the issue of the party executing it. (3.) On the pursuer's death the first tenant in tail male, whoever he may then be, will be entitled to possession, and at or after twenty-one years of age will be in a position by his own deed alone to bar the entail to all effects, so far as he may not previously have done so. (4.) That if the entail be not barred by the tenant in tail, it will descend on his death to his heir in tail male,—that is to say, his eldest son or the issue male of such eldest son, such son or issue taking by descent, and not as a beneficiary named by General Studd. (5.) That an estate in tail male or in tail can be made available by creditors for payment of the debts of the tenant in tail, whether in expectancy or in possession, to the same extent as he himself could dispose of it for his own benefit.

On the 9th of July, 1880, the Lord Ordinary (1) pronounced the following interlocutor:—"Finds (1.) that according to the sound construction of the last will of the deceased Major-General Edward Mortlock Studd, of Oxton, in the county of Devon, dated the 21st of April, 1877, and codicil thereto, dated the 14th of November, 1877, the lands of Banchor, in Inverness-shire, belonging to the testator at the time of his death, were destined by him to his eldest son, Edward Fairfax Studd, and to the heirs male of his body in fee; whom failing, to the testator's trustees during the life of the testator's younger son, Alnod Ernest Studd, and after his death to the heirs male of the body of the said Alnod Ernest Studd; whom failing, to the heirs female of the body of the said Edward Fairfax Studd; whom failing, to the heirs female of the body of the said Alnod Ernest Studd; whom failing, to certain other persons named: Finds (2.) that the said bequest imports a right of fee in said lands in the person of the said Edward Fairfax Studd: Therefore decerns and declares in terms of the first conclusion of the summons: Dismisses the other conclusions of the action, and decerns."

Against this interlocutor the respondent, as curator ad litem to Edward Arthur Studd and Gladys Studd, the pupil children of the appellant, presented a reclaiming note.

By interlocutor, dated the 10th of December, 1880, the Second Division of the Court of Session (the Lord Justice Clerk (2) dissenting) recalled the interlocutor of the Lord Ordinary, repelled the pleas in law for the appellant (pursuer) and sustained the second and third pleas in law for the defenders, Edward Arthur Studd and Gladys Studd (3).

March 15, 19, 20. The *Lord Advocate* (*Balfour*, Q.C.), and *Davey*, Q.C., maintained for the appellant that the special devise of the estate of Banchor contained in the will being void, as inapplicable to Scotch real estate, the property falls either into residue or alternatively into intestacy. Whether a disposition of lands situated anywhere is valid or not must be decided by the lex rei sitæ. The will here as a devise of Scotch land must be construed

(1) Lord Curriehill. (2) Moncreiff.
(3) 8 Court Sess. Cas. 4th Series, 249.

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with reference to the rules of conveyancing in Scotland. If construed according to legal English language, the testator has attempted to create an estate with a series of limitations which are perfectly unknown to the law of Scotland. Not only is the mode of creating and barring an English entail, and the very large number of powers and faculties incorporated therewith unknown to the law of Scotland, but the language used is totally unknown. The genius and principle of the English law of real property, and of the Scotch feudal law, are so fundamentally different and the system of conveyancing adopted in the two countries so distinct, that a formal and technical conveyance or deed of settlement framed according to the forms and to meet the requirements of the law and practice of the one country cannot be applied to the real estate situated in the other. To endeavour to interpret such a deed and to find equivalents in the legal language of the country for the technical terms used in the other, could only lead to a confusion of the land rights of both countries. For these reasons this disposition, in the form of an entail, must fail altogether as regards the Scotch estate.

The majority of the Court below went on the ground that this was an executory trust, and that it was a mere declaration of testamentary intention to be carried into effect by another deed. That was an erroneous view, it was not even a trust executed, it was a direct conveyance, and treated as such with regard to the English estates. Why then was it treated differently with regard to another estate mentioned in the same collocation of words? It could only be because the conveyance as it stood was unintelligible to Scotch practitioners.

No doubt the intention of the testator, this being a will, must be construed out of the words he has used, but a testator leaving land in two different counties must be assumed to have knowledge of the law of the rei sitæ. And the intention of the testator was evidently to give a different estate in Scotland if he could not give both estates by the same words. The Act of 1868 did not help the respondent. The enactments of that statute simply affect the will as a conveyance. The position of the holder of a general disposition, apart from the Act, was that he had a jus actionis or a jus ad rem. He had not a warrant for

infeftment in the lands intended to be conveyed, and had not, therefore, a registerable title, but by the 19th section of the Act of 1868 his general conveyance is made a registrable conveyance by the medium of the notarial instrument; and if the appellant here proceeded to make up his title in that manner, he would record a notarial instrument in the precise terms of the disposition clause in the will, and on this being recorded the appellant would be placed, by the 19th section of the Act of 1868, as he would have been had a conveyance of the lands of Banchor been granted in his favour containing all the necessary clauses. Or, he might have adopted the mode set out in sect. 20 of the Act. Being himself the successor and the heir-at-law, he might have served himself heir, and recorded his service, and then conveyed the lands to himself and the other devisees under the will, and recorded the conveyance. His title, undoubtedly, would have been registrable, but it would have been a title funditus null and void, because the right attempted to be conferred on him would have been one unknown to the law of Scotland. They submitted that no power was conferred by the testator, or by the Legislature, on his trustees, or on the appellant, or any one else to convert this impossible title into any of the rights known to the law of Scotland.

Secondly, if some effect must be given to the will, then it came under a technical ruling in Scotch law that a destination to A. in liferent, and to his children in fee, imported an absolute fee in A., and a spes successionis only in his children: *Frog's Creditors* v. *His Children*, 1735 (1); *Lillie*, 1741 (2). Thus, as the Lord Ordinary put it: "The devise being a bequest or conveyance not protected by a trust, or in any way limited to the appellant in liferent, it fell under the rule in *Frog's Case*." No doubt eminent judges had condemned that rule as unreasonable, but so long as it remained a rule of the law of Scotland, it must be applied to conveyances of Scotch heritage whenever the terms of the conveyance—in whatever language couched—are such as to bring it within its scope. And to restrain this rule applying

(1) Mor. Dic. 4262; 3 R. L. C. 602; see also cases cited, Bell's Prins. 7th ed. at p. 772.

(2) Mor. Dic. 4267.

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it required some express words: *Dewar* v. *M'Kinnon*, 1825 (1); *Gordon* v. *Macintosh* (2); *Ralston* v. *Hamilton* (3). In Scotch law, if the word "allenarly," i.e., "only" is used, the application of the rule of *Frog's Case* (4) is refused: *Newlands* v. *Newlands' Creditors*, 1794 (5). Equivalents for the word "allenarly" have been allowed: see *Dawson* v. *Dawson* (6); see also *Crumstie* v. *Crumstie's Trustees* (7); but, primâ facie, "allenarly" is the proper word to use to restrict the parent to a mere liferent: see *Lord Campbell Gordon* v. *Macintosh* (8). But they submitted that in this will no equivalent word was used, and there was nothing to restrain the rule taking effect.

Assuming that the words "to my eldest son for his life without impeachment of waste" must be translated, they must be interpreted by the canons of Scotch law. Now "without impeachment of waste" are not attributes of the Scotch law, they are words applicable to English estate, and with a preliminary reference to English settlements, they found that these words gave the owner of the life estate, or the liferenter, great benefits. Thus they understood them as words of enlargement and not of limitation, words of power and not of restraint, and therefore in no way equivalent to the word "allenarly," or any of the equivalents allowed in Scotch law.

They also commented on *Mein* v. *Tayler*, 1827 (9), and *Bernal* v. *Bernal* (10).

The Solicitor General for Scotland (*Asher*, Q.C.), and *Rigby*, Q.C. (11), contended for the respondent, that *Frog's Case* (4) was a mere technical canon of construction applicable to particular

(1) 1 W. & S. 161.
(2) 4 Bell, App. 105; 3 R. L. C. 617.
(3) 4 Macq. 397.
(4) Mor. 4262; 3 R. L. C. 602.
(5) Mor. 4289; 3 R. L. C. 634.
(6) 4 Court Sess. Cas. 4th Series, 597.
(7) 3 Court Sess. Cas. 4th Series, 924.
(8) 3 R. L. C. at p. 624.
(9) 5 Court Sess. Cas. 1st Series, p. 727; aff. 4 W. & S. 22; 3 R. L. C. at p. 696.
(10) 3 My. & Cr. 559.
(11) They were desired by the House to confine their arguments to the question whether Frog's rule applied, as their Lordships were all of opinion that some effect must be given to the will.

words, which did not apply if it was the clear intention of the testator's trustee not to give the fee to the parent. In *Newland's Case* (1) the word "allenarly" was held to displace it. Nor was the word "allenarly" absolutely essential as a technical expression to carry into effect such an intention. It was now not doubted that whenever there is any expression of intention, whether in express words or otherwise, that the intention was to give only a liferent to the parent, the rule of *Frog's Case* (2) will be excluded: see *Douglas* v. *Sharpe*, 1811 (3); *Scott* v. *Napier*, 1826 (4); *Dawson* v. *Dawson* (5); *Ramsay* v. *Beveridge*, 1854 (6). In the latter case Lord Justice Clerk (Hope) (7) said, "he had been much staggered at finding that any view which could be taken of the previous cases could compel a Court to disregard clear expressions of intention." And Lord Wood (8) quoted, with approval, an opinion of Lord Moncreiff in *Hutton's Trustees*, 1847 (9), to the effect that "the general principle being that we must look to the intention of the maker of the deed, in so far as it may be expressed or distinctly indicated by the terms employed in all the clauses." He then doubted that Lord Cottenham was correctly reported as saying, in *Gordon* v. *Macintosh*, 1845 (10), that nothing short of the taxative word "allenarly" annexed to the provision of liferent will restrict it to a liferent interest; for he could find no case where the Court had prescribed one word, or the words "allenarly" or "only," or "for liferent use alimentary," or some equivalent word or words annexed to the provision of liferent, by which the party is alone at liberty to express his intention that the parent shall take no more than a liferent interest: see also the Lord President (Inglis) in *Maule*, 1876 (11). Then the question here came to this, What did the testator intend by the clause to my eldest son for life "without impeach-

(1) Mor. 4289; 3 R. L. C. 634.
(2) Mor. 4262; 3 R. L. C. 602.
(3) Hume, 173.
(4) 4 Court Sess. Cas. 1st Series, 460; affirmed 2 W. & S. 550.
(5) 4 Court Sess. Cas. 4th Series, 597.
(6) 16 Court Sess. Cas. 2nd Series, 764.
(7) 16 Court Sess. Cas. 2nd Series, at p. 774.
(8) Ibid. at p. 777.
(9) 9 Court Sess. Cas. 2nd Series, 639
(10) 4 Bell App. 105; 3 R. L. C. 617.
(11) 3 Court Sess. Cas. 4th Series, at p. 834.

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ment of waste," and to his heirs in tail male. It is what is called a foreign will, and you have to apply the well-known canon of legal construction applying to the words the testator has used in the language in which the will is written, and putting that construction into popular language to see if that meaning can have effect under the lex rei sitæ: *Di Sora* v. *Phillips* (1).

The appellants admit that this will applies to the rule of construction in English law by which a bare life estate, or liferent, is given to the appellant, and not the fee. The words without impeachment of waste are as clearly expressive of the intention, and as exclusive of *Frog's Case* (2), as if the words "allenarly" were used. If the appellant was to have the fee they were superfluous. But further, there is in the will a power of jointuring and a power to make provision for younger children. Also leasing powers. All these powers being strictly appropriate to a life interest only.

Now there is no doubt that by the common law of Scotland, in a question as to moveables, the whole matter is of the expressed intention; and now by the Act of 1868, it is a part of the statutory law, as to heritage. Sect. 20 of that Act provided (*a*) in reference to heritage, that it may be conveyed by mortis causa deed or writing; (*b*) it provided that the word "dispone," which was formerly essential shall be so no more; (*c*) it provided that heritage may be conveyed by testament, provided words are used in regard to the heritage, which if used in regard to moveables would have been sufficient to carry them; and (*d*) that such testamentary deed or writing shall be equivalent to a general disposition under the 19th section of the Act and shall create an obligation on the heir-at-law to make up a title and convey to the grantee, or the grantee may make up his title as on a general disposition.

In *Aim's Trustees* v. *Aim*, 1881 (3), the Act was given effect to. It was there held that the writing in question being conceived in terms applicable to the deceased's whole estate, heritable as well as moveable, and being a clear expression of his intention, and being sufficient to confer a right to receive the moveable estate,

(1) 10 H. L. C. 624. (2) Mor. 4262; 3 R. L. C. 602.
(3) 8 Court Sess. Cas. 4th Series, 294.

was also by virtue of the above section equivalent to a general disposition in favour of heritage.

In a case such as this, there is no law of Scotland applicable to moveable property which would prevent the actual intention, when once duly ascertained, by a reference to the construction put on the deed by the law of the language in which written. In *Trotter* v. *Trotter* (1), a will dealt with moveables and heritable estate in Scotland. The testator was domiciled in India. It was decided that the construction of the intention, and the legal consequence of that construction must be determined by Indian law, that is English law. The Lord Chancellor there said, that if the rule of interpreting the will by the law of the land where made, and the language in which it was couched, were to be disregarded, the consequence would be disastrous. See also *Dundas* v. *Dundas*, 1824 (2), the converse of this case: *Mitchell and Baxter* v. *Davies* (3). Therefore it appears, that the first question is the law of the rei sitæ; and that law is the law of intention; and if the intention has to be discovered and certain words have to be interpreted you refer to the language in which the deed is made. Then as to heritage, the 20th section of Act 1868 gives power to give effect to them in the same way as if the will dealt with moveable estate; and if there is nothing in the lex rei sitæ against that intention being carried out, it must be given effect to, or at least as far as it can with respect to that law. No doubt, difference could be pointed out between the powers enjoyed by a proprietor for life in England, and those enjoyed by a proprietor for life in Scotland, but the existence of those differences was of the very slightest importance. Nor was the technical way in which effect might be best given to the testator's intention material. Under the English destination the fiar cannot alienate or burden his own interest in any way during the subsistence of the life estate. In Scotch conveyance an equivalent exists by the vesting of the fee in the fiar being postponed till the expiry of the liferent, a fiduciary fee being constituted to subsist until that event should occur. The ultimate result under either would be the same.

(1) 5 Court Sess. Cas. 1st Series, 241.
78; 3 W. & S. 407.
(2) 7 Court Sess. Cas. 1st Series, 208.
(3) 3 Court Sess. Cas. 4th Series,

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The *Lord Advocate*, in reply:—

In *Cott* v. *Napier* (1) the executory element was introduced. *Ramsay* v. *Beveridge* (2) was a case of very great peculiarity. "Without impeachment of waste," and the other limitations, relied on by the respondent, were used only, because the testator in his will was dealing with both English and Scotch heritage: and because one lex rei sitæ put a particular construction on those words, that was no reason the other lex rei sitæ should.

EARL of SELBORNE, L.C.:—

The first question on this appeal is, whether the will of the testator General Studd does or does not contain a valid disposition of his Inverness-shire estate. Upon that point your Lordships did not think it necessary to hear the learned counsel for the respondents. Any disposition which would be effectual as to moveables is, by the Land Titles Consolidation (Scotland) Act of 1868, made effectual as to Scotch heritage, without regard to technical rules.

The Lord Justice Clerk (a judge from whose opinions I seldom differ, and never without hesitation) appears to have considered, that the only intention which the testator had expressed in this will as to his Inverness-shire estate, was to create an English entail of it, with all the incidents and consequences of an English entail according to English law; and that as this was impossible by the law of Scotland the entire disposition must fail. In that view I cannot concur.

The English words, "in tail male," are nothing more than a short mode of describing a gift to a man and the heirs male of his body; which latter words ought, in England, to be used when such an estate tail is created by deed; though any words from which the intention can be ascertained are sufficient in a will. If in the present case the dispositions now in question were paraphrased in the way which would properly express the same meaning in an English deed, and if they were confined to the Inverness-shire estate, they would run thus: "I devise all my freehold lands and hereditaments situate in the county of Inverness,

(1) 4 Court Sess. Cas. 1st Series, 460; affirmed 2 W. & S. 550.

(2) 16 Court Sess. Cas. 2nd Series, 764.

unto and to the use of my elder son Edward Fairfax Studd, and his assigns, for his life, without impeachment of waste, and, after his death, unto and to the use of his first and other sons, successively, according to their respective seniorities, and the heirs male of their respective bodies," with remainders over, in which the words "in tail male," as often as they occur, would in like manner be rendered by the equivalent terms, "and the heirs male of their respective bodies," and the words "in tail" by the terms, "and the heirs of their respective bodies." I take it to be quite clear that a disposition of Scotch heritage, in precisely similar terms (though the word "freehold" may be technically inapplicable to Scotland, and though the words "with remainder," might, in Scottish legal phraseology, be replaced by their equivalent; "whom failing"), need not be ineffectual, either wholly or in part, but that, on the contrary, it would take effect through the whole series of limitations, unless the course of succession were subsequently altered by any one of the hæredes designati competent by the law of Scotland to make a valid disposition of the property.

This being so, I hold it to be clear that neither the use of English terms of art, nor the intention to create, in Scotland, an estate as nearly as possible corresponding to an English estate tail, ought to prevent such dispositions from operating in Scotland to the fullest extent to which, by the law of Scotland, they can operate. There is no reason why the intention should fail altogether because some consequences of it, which the testator may have had in contemplation, cannot take effect. The incidents and consequences of the estate or estates which, under such a form of gift, may vest in the donees, according to Scotch law, must, of course, be determined by that law, and not by the law of England. But the fact that a donee, who, in England, would take under those words an estate tail, capable of being barred under the Act for the Abolition of Fines and Recoveries, and not otherwise, would, in Scotland, be a fiar, without fetters—or that, in England, he would have only limited statutory powers of leasing beyond his life, while, in Scotland, his powers would be unlimited—is no reason why the destination itself to him and the heirs male of his body, and to the rest of the hæredes designati in succession, should not take effect in Scotland, as far as by law it

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may. If, in England, real and personal property were both given together, by an exactly similar series of dispositions, the same thing would happen. By English law real property can be entailed, so that (unless and until the entail is barred) it may be transmitted through the whole intended course of succession, but personal property cannot. The disposition, however, of the personal property would not therefore fail; it would receive as much effect as the law applicable to personal property could give it, which would vest that property absolutely in the first tenant in tail of the land. The case of *Forth* v. *Chapman* (1) is a well-known and often quoted example of the flexibility in English law, with respect to different kinds of property governed by different rules and having different incidents, of the same words occurring in a single clause of disposition.

Whatever therefore is the interest which (having regard to the law of Scotland) ought to be deemed to have vested under the words of this will in the appellant Edward Fairfax Studd, I am of opinion that the disposition of the Inverness-shire property was not wholly ineffectual.

The remaining question is, whether the intention of the testator, when ascertained according to such principles of construction as ought to be applied to the words of this will, was to give the appellant an estate for life only, or to give him the fee for his own benefit; so that his eldest son would, in the one case, have an indefeasible right of succession to the fee, as institute under the will, subject to the burden of his father's liferent; and would, in the other case, have nothing but a mere spes successionis, transmissible from and through his father, and defeasible by any alienation, &c., which the father in his lifetime might make by deed or will.

I have stated this to be simply a question of intention, because the Act of 1868 says (in effect) that the intention, as manifested by the will, is to prevail as to heritage in the same way that it would prevail as to moveables; and there is no law of Scotland, applicable to moveable property, which would prevent the actual intention in such a case as this from receiving full effect when once duly ascertained. The technical way in which effect might

(1) 1 P. Wms. 663, at p. 667.

be given to it by Scotch law seems to me to be, for this purpose, immaterial. If it were material, I should assent to the proposition of the appellant's counsel, that the gift here is direct, and not executory, and is not meant to be effectuated through the medium of a conveyance by trustees.

There is a rule of construction applicable to Scotch dispositions of either immoveable or moveable property (between which, in this respect, there is no distinction) in favour of parents and their unborn children, known as the rule in *Frog's Case* (1), and which, though sometimes criticised as arbitrary, must be taken in all cases to which it properly applies as settled by the law of Scotland. According to that rule, a destination to a parent in liferent, and after his death to his children (unborn at the date of the disposition) in fee, vests the fee in the parent, unless an intention to the contrary is in some sufficient way manifested, which is most usually done by the addition after "liferent" of the word "allenarly" or "only"; but may also be done (as the cases of *Douglas* v. *Sharpe*, 1811 (2) and *Dawson* v. *Dawson* (3), cited for the respondents, shew) by any other means which unequivocally indicate an intention not to vest the fee in the parent.

In the present will, made in England in English form, we have not the word "only" (or anything equivalent to it) superadded to the destination to the Appellant "for his life"; obviously (as it seems to me) because the rule in *Frog's Case* (1) does not belong to that system of law, in the language of which this will is expressed. But the question is, what estate the testator intended to give, first, to his son, the appellant, and, secondly, to the appellant's (then unborn) eldest son? The one question, what the intention was as to the father is, (as it seems to me,) inseparable from the other question, as to the child. If the meaning of the testator's words, in the system of law from which they are borrowed, may properly be regarded (and I myself see no reason for distinguishing, in that respect, between their meaning and their legal effect, because the question is, what estates the testator *intended to give*), there is no room for doubt that he meant the father to take a life interest "only," and the child to take what

(1) Mor. Dict. 4262; 3 Ross L. C. 602. (2) Hume, 173.
(3) 4 Court Sess. Cas. 4th Series, 597.

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(in English law) is called a remainder expectant upon a life estate, equivalent, in Scotch law, to a fee under burden of liferent. If the instrument had been Scotch, conceived in the language of Scotch law, it might, I suppose, have been proper to take into account the rule in *Frog's Case* (1), for the purpose of ascertaining the testator's intention, on the principle stated by Lord Eldon in *Dewar* v. *M'Kinnon*, 1825 (2). But to import a technical Scotch rule of construction into the interpretation of a will conceived in the language of a different system of law, when the sole question is as to the testator's intention, and when, by the law of Scotland itself, that rule is not inflexible as to immoveable more than moveable property, does not seem to me to be consistent with sound principle, or with the doctrines laid down by the eminent judges who decided *Trotter* v. *Trotter* (3), *Mitchell and Baxter* v. *Davies* (4), and *Ramsay* v. *Beveridge* (5).

If more were necessary to repel the application of the rule in *Frog's Case* (1), and so to bring the present will within the principle of *Douglas* v. *Sharpe* (6) and *Dawson* v. *Dawson* (7), there would, in my opinion, be for that purpose enough here. This testator has plainly manifested his intention that the appellant should take (if he could give it to him) *the same* interest in all and every part of the immoveable property, in England and Scotland, which he aggregated together under the description of "Edward's freehold estate;" and in the English part he clearly takes an estate for his life *only*. That life interest is qualified by the words "without impeachment of waste," shewing that the testator intended to give the appellant such an estate as would not enable him to cut timber or to open mines, &c., without the special authority which those words confer. In Scotland, as well as in England, such powers may, by any sufficient words, be given to a man who has a liferent only; and, unless so given, they will not be incident to such an estate. The testator has also, by this will, given to the appellant other special powers, extending to the Scotch as well

(1) Mor. Dic. 4262; 3 R. L. C. 602.
(2) 1 W. & S. 161.
(3) 5 Court Sess. Cas. 1st Series, 78; 3 W. & S. 407.
(4) 3 Court Sess. Cas. 4th Series, 208.
(5) 16 Court. Sess. Cas. 2nd Series, 764.
(6) Hume, 173.
(7) 4 Court Sess. Cas. 4th Series, 597.

as to the English property, i.e., to appoint a jointure to his widow and portions to his younger children, which are not to exceed in the whole £15,000, and from which an eldest son is excluded; and also to grant leases, under certain conditions and limitations, not to be transgressed. All such powers would be superfluous, and all the restrictions placed upon their exercise would be nugatory, as to the Scotch property, unless the appellant were restricted to a liferent only.

I am therefore of opinion that the interlocutor appealed from is in substance right, and ought to be affirmed. The costs must, of course, be provided for by the appellant.

LORD WATSON (having stated the facts, continued) :—

The point thus raised for decision—the legal effect of a devise of Scotch heritage in an English will—is one of novelty and importance; and it gave rise to great diversity of judicial opinion in the Court below. The Lord Ordinary (the late Lord Curriehill) thought that the devise was, in effect, a conveyance to the appellant in liferent, and to the heirs male of his body, and thereafter to a series of heirs in fee, subject to the limitations of an English entail; and, holding that these limitations could receive no effect in Scotland, and that, by the law of Scotland, such a conveyance imported a fee in the appellant, he decerned in terms of the first conclusion of the action. When the case came before the Second Division of the Court on a reclaiming note, the Lord Justice Clerk (Moncreiff) was of opinion that the devise, and the conditions attached to it, constituted a settlement in tail male according to the law of England; and that the law of Scotland cannot recognise or give effect to a conveyance of landed estate qualified by such conditions. His Lordship accordingly came to the conclusion that "the whole settlement must fail, and the pursuer (appellant), as heir-at-law, must prevail." The majority of the Court, consisting of Lords Gifford and Young, took a different view. They held that the law of Scotland must, so far as practicable, give effect to the intention of the testator, as expressed in his English will; and seeing that the language of the will, read in the light of English law, gave the appellant nothing more than a liferent right, they assoilzied the defenders from the

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whole conclusions of the action. I am of opinion, and on substantially the same grounds, that the case was rightly decided by the two learned judges who formed the majority of the Court, although I do not concur in some of the observations which fell from their Lordships.

It must be kept in view that down to the year 1868 no foreign will, unless it was executed with all the formalities required by Scotch law, and was expressed in appropriate terms of de præsenti conveyance, could affect heritable estate in Scotland. In all deeds relating to heritage words of de presenti conveyance were necessary, and "dispone" was an expression not merely technical but indispensable. No deed professing to convey or settle heritable estate, whether inter vivos or mortis causâ, could receive effect unless the dispositive clause contained that magic word. In 1868 the necessity for using "dispone" or other words of de presenti conveyance, was dispensed with by sect. 20 of the Titles to Land Consolidation (Scotland) Act, in the case of mortis causâ and testamentary deeds and writings relating to heritage. It was not until the passing of the Conveyancing and Land Transfer (Scotland) Act in 1874, that "dispone" ceased to be verbum sine quo non in the case of dispositions inter vivos. The 27th section of that Act provides that the absence of the word shall not affect the validity of any deed or writing as a conveyance of heritage, provided it contains "any other word or words importing conveyance or transference, or present intention to convey or transfer."

But for the provisions of sect. 20 of the Act of 1868 (31 & 32 Vict. c. 101), the will of the late General Studd would have been defective, according to the law of Scotland, both in execution and in expression, and would have carried no right whatever to the estate of Banchor, and I venture to think that the real, if not the only question which the House has to consider in this case is, to what extent and effect has the old rule of the Scotch law been relaxed, in the case of a foreign will, by these statutory provisions?

It is therefore necessary to attend to the language of sect. 20 so far as it bears directly upon that question. The clause commences with a declaration that it shall be competent to the owner of heritable estate to settle the succession to the same in the event

of his death by testamentary or mortis causâ deeds or writings, and that no such deeds or writings shall be held to be invalid by reason of the grantor not having used the word "dispone," or other words importing a conveyance de præsenti. It is then enacted that, "Where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or settlement with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken as equivalent to a general disposition of such lands within the meaning of sect. 19 hereof, &c."

In my opinion the obvious purpose of the provisions which I have just quoted is to assimilate, so far as possible, the settlement of heritable to that of moveable estate. First, as regards execution, the effect of these enactments is that a writing duly executed as a Scotch testament, e.g., by one notary and two witnesses, will suffice to carry heritage, and that any settlement executed in a foreign country will also be sufficient for that purpose, if it be executed in such manner as would render it a valid settlement of moveable estate in Scotland. Secondly, as regards the language which must be used in such a writing in order to affect Scotch heritage, it is not necessary to resort to the technical terms of Scotch conveyancing, or even to employ language familiar to Scotch lawyers. Any words which in a settlement of moveables would be recognised by the law of Scotland as sufficient to create a right or claim in favour of an executor, grantee, or legatee, must receive effect if used with reference to lands in Scotland. Thirdly, words sufficient to create a right or claim to moveables are, when used in reference to lands, declared to be equivalent to a "general disposition" of such lands.

Now a "general disposition" of lands in the law of Scotland simply means a conveyance, which, from the want of a full description of the lands or from the want of proper feudal clauses, does not of itself constitute a sufficient warrant to the disponee to

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obtain infeftment directly, by recording the deed in the register of sasines, or by expeding and recording an instrument of sasine. If the heir of the disponer declined to make up a title and then convey the lands to him, the disponee, prior to the Act of 1868, could not obtain a feudal right to the subjects except by an action of constitution and adjudication in implement directed against the heir. The 19th section of the Act of 1868 enables the disponee to obtain infeftment directly without the aid either of the heir or of the Court, by expeding and recording in the appropriate register of sasines a notarial instrument in the form prescribed by Schedule L. annexed to the Act. It is almost unnecessary to say that "general disposition" is a very comprehensive term; and, taken by itself, gives no information as to the nature of the right which may be thereby constituted. There may be a "general disposition" of each and every right or interest in land, limited or unlimited, which can be made the subject of legal conveyance and is capable of being clothed with infeftment.

In enacting that the words of the deed or writing shall be equivalent to a "general disposition" the legislature obviously did not intend to define the character of the rights and interests conferred upon the persons favoured by such deed or writing, but to indicate the means by which these persons were to obtain a complete feudal title. The only possible mode of ascertaining the precise character of these rights and interests is by an examination of the language of the deed or writing; and that language must be read and construed for the purpose of ascertaining the intention of the settlor, just as if the settlement had been of moveables, and not of heritage. When the intention of the settlor has been so ascertained the law of Scotland must give effect to it, in so far as is practicable consistently with the principles which govern the tenure of heritable estate in Scotland.

Greater difficulty may possibly be experienced in giving precise effect to a foreign will relating to Scotch lands than in the case of a foreign will relating to moveables only, because no conditions or limitations attached to a settlement of land in Scotland can receive effect if they be inconsistent with the lex loci. But such impossible conditions and limitations when they occur do not void the settlement, although the grantor intended them to be effectual.

The rule applicable to a settlement, whether it be of moveables or of land, whether it be in the form of a probative Scotch deed or of a foreign will capable of carrying an interest in Scotch land by virtue of sect. 20 of the Act of 1868, must always be valeat quantum valere potest. I know of no Scotch case in which a bequest of moveables or a conveyance of land has been held to be ineffectual because a condition attached to such bequest or conveyance, not being a condition precedent, was repugnant to the law of Scotland, although the intention of the testator or disponer was thereby defeated pro tanto. There is abundant authority to the contrary. A testator directs his trustees to accumulate the rents of land for forty years, and then to pay over these rents with accruing interest to a person named. The intentions of the testator cannot be carried out, because of their inconsistency with the provisions of the Thelluson Act, but the beneficiary will take the twenty-one years' accumulations which the Act permits. Or a trustee directs his trustees to make a "strict entail" upon A. and his heirs whomsoever, whom failing, upon B. and his heirs whomsoever. What the trustees are thus directed to do is a legal impossibility, because such a destination is not in the sense of Scotch law a "tailzied" destination, and cannot therefore be made the subject of an entail. Yet twelve out of the thirteen judges of the Court of Session, in the case of *McGregor* v. *Gordon* (1), held the legal consequence of a direction in these terms to be, not that it was to be treated as void, but that A. took in fee simple, and was free from the fetters which the truster desired to impose upon him, because the law forbade their imposition. Again, where a deed of entail, executed in strict form, embraces both land and moveables, I do not think any Scotch lawyer would entertain a doubt that whilst the fetters applied to the land, they could not attach to the moveables, which would belong in fee to the institute.

The will of General Studd is sufficiently executed to satisfy the requirements of sect. 20 of the Act of 1868; and the words of devise plainly refer to the estate of Banchor, the only lands belonging to the testator in the county of Inverness. The expression "freehold of inheritance" has no meaning in the law of

(1) 3 Court Sess. Cas. 3rd Series, 148.

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Scotland; but when translated into popular language, it does describe, though not with perfect accuracy of definition, the tenure by which the deceased held the estate of Banchor, and the nature of his interest in it. Even if the expression were less appropriate, it would not make any difference in this case, because the rule of the law of Scotland in such matters is falsa demonstratio non nocet, si satis constet de relato. The gift of the estate, and the restrictions and limitations attached to it, are expressed in the technical language of English conveyancers; and, to my mind, it is no disadvantage, that an Englishman settling his Scotch estates, and availing himself of the leave which the Legislature has given him to dispense with the formal terms of a Scotch deed, should express his intentions in the legal phraseology of his own country, and not in popular language. That course, when adopted, as it has been in this case, enables the parties, or the Court, by reference to the law of England, to ascertain with legal precision, the rights and interests in his Scotch estates which the testator intended to give to the persons favoured by his will, and to determine how far these rights and interests can receive, or must be refused, effect, according to their consistency or inconsistency with the land laws of Scotland. If General Studd's will be interpreted according to the rules of English law, it is certain that the intention which he therein expressed was that the appellant should take a mere liferent, and that the fee of the estate of Banchor should go to the eldest son of the appellant, and the other heirs nominated in the order of their appointment. The law of Scotland in so far as regards the separate destination of the liferent and fee of the estate can give, and I can see no reason why it should not give, effect to the intention so expressed.

It has, however, been argued for the appellant (and his contention on this point was favoured by the Lord Ordinary) that he is entitled to take a right of fee, because, by the law of Scotland, a conveyance of land to the use of A. for his life and to his children nascituris in fee, gives the parent the full beneficial fee. To that argument there are two answers, either of which appears to me to be conclusive. In the first place, the Legislature in enacting sect. 20 of the Titles to Land Act did not, in my opinion, contemplate or provide that in the case of an English will

relating to land in Scotland, expressed in terms of English law, words having an intelligible legal meaning in both countries should be separated from the context and construed according to the canons of Scotch law. What I think the Legislature did intend, and have provided, is, that the intention of the testator shall be gathered from the whole context of the will interpreted by the rules of English law. In the second place, even if the words on which the argument is founded fell to be construed according to the law of Scotland, the rule established in *Frog's Creditors* v. *His Children* (1) and the series of decisions by which that case has been followed is not an inflexible rule, but must yield to reasonable presumption that the maker of the deed intended otherwise; and the will of General Studd contains numerous provisions clearly indicative of his intention that the appellant's interest should be restricted to a liferent.

If, as I venture to think, the interest which the appellant takes in the estate of Banchor under his father's will is merely that of a liferenter, that is sufficient for the disposal of this appeal. The appellant has so framed its conclusions that your Lordships in the present action can do no more than affirm, either that he is or that he is not, entitled to the fee of the estate.

There are one or two matters which I shall briefly notice, because they have been referred to in the opinions of the learned judges in the Court below, and have entered into the argument at your Lordships' bar.

The statute of 1868 expressly provides that the devise of the estate of Banchor in General Studd's will shall be equivalent to what is known in the law of Scotland as a general disposition of that estate in favour of the devisees. There is, so far as I can see, no possibility of the devisees obtaining any other conveyance to the estate, unless the appellant were to make up a title as heir-at-law to his father, and then to execute a conveyance in favour of himself and the other devisees according to their respective interests,—a course of procedure which, in a case like the present, would be manifestly inexpedient. There is no devise of the estate to the trustees of the will, with directions to settle it; and there is, in my opinion, no administrative purpose to be served

(1) Mor. Dict. 4262.

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thereby which would justify the trustees in making up a title under sect. 46 of the Conveyancing and Land Transfer Act, 1874, and thereafter granting a conveyance to the parties entitled.

The provisions of sect. 19 of the Act of 1868 afford the readiest method by which the devisees can obtain a complete feudal title in a case like the present. The only other alternative is an action of constitution and adjudication in implement against the heir-at-law of General Studd, not an expedient process, when the heir is both pursuer and defender. An action of declarator, for ascertaining the relative rights and interests of the parties entitled to take under the will or general conveyance, may afford useful aid in making up a title by notarial instrument under sect. 19. An English will relating to Scotch heritage may be expressed in terms of bequest so simple that no declarator is needed; and, on the other hand, a Scotch testamentary writing may be expressed in language so obscure that if recorded per se in a notarial instrument, it would not constitute a good marketable title. In all cases where the precise nature of the rights conferred is matter of serious doubt, an action of declarator is a desirable if not a necessary step. If your Lordships had recalled the judgment of the Inner House in this case, and reverted to that of the Lord Ordinary, the appellant would have had no difficulty in making up a clear feudal title to the estate of Banchor, by framing and recording a notarial instrument in terms of sect. 19, and narrating therein the decree of the Court, as one of the links connecting him with the devise. In like manner, if a decree were obtained, determining the respective rights of the devisees, it would be available to both the liferenter and the institute, for the purpose of making up a complete and intelligible feudal title to their respective estates under the provisions of sect. 19.

Although it may be impossible to give effect in Scotland to all the rights and powers incident to a liferent estate in England, I agree with the Lord Chancellor in thinking that the law of Scotland must give the appellant the powers which, in England, are implied in the words "without impeachment of waste"; and likewise the powers of jointuring and of making provision for younger children, which are expressly conferred upon him by the terms of the will. I also concur in what has been said by the Lord

Chancellor in respect to the devise of the fee, and the extent of its efficacy in Scotland. The gift of fee must receive effect, although the fiars will take it unfettered by certain limitations implied in an English settlement in tail male.

The devise in this case is to the first and every other son of the appellant, "after the death of the said Edward Fairfax Studd." I do not think that under such a destination the eldest son can be held to take a fee upon his birth, because the vesting and divestiture of a proper feudal fee, as distinguished from a heritable jus crediti, is, I humbly conceive, alien to the principles of the law of Scotland. Such a devise appears to me to be equivalent to a destination to A. in liferent, for his liferent use allenarly, and to the heir male of his body in fee. In both cases there will be an implied fiduciary fee in the liferenter so long as he lives; but there can be no vesting of the beneficial fee before his death, because, until that event occurs, it is impossible to ascertain who is entitled to the character of disponee or institute.

I am accordingly of opinion that the interlocutor appealed against ought to be affirmed with costs.

LORD FITZGERALD:—

My Lords, having heard the very instructive judgments which have been just delivered it would be inexcusable in me to take up much of the public time in expressing my entire concurrence. The arguments at the bar were not only very able but so full as to give us every aid, and enabled your Lordships in the course of the hearing to dispose of many of the points that were discussed, such as that the description was sufficient to pass the Banchor estate, and that there was no room for doubt as to the testator's intention whether the will be interpreted as it stands according to the law of England or according to the law of Scotland with its technical terms translated for the aid of the Scotch judges.

My Lords, I conceive it to be fortunate that we do not feel ourselves coerced to adopt the judgment of the Lord Justice Clerk, to the effect that the law of Scotland would not recognise or give effect to such a will as that which we have now before us so far as it relates to real property in Scotland. To adopt that view would be somewhat disastrous as tending to widen the

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divergence of the real property laws of the two countries, whereas your Lordships' judgment enables us to smooth over some of their difficulties.

Your Lordships, then, being of opinion that the will of General Studd having been executed according to the solemnities of Scotch law, is effectual to pass the estate of Banchor and is to be recognised and given effect to, and the rights of the parties ascertained as to the Scotch estate according to the law of Scotland, I desire to add a few words on the question whether the pursuer took a greater estate or interest than a liferent. On this question the pursuer's counsel relied principally on *Frog's Case* (1), as to which I may say that we no more intend to dispute it or to take away from its effect than we would endeavour to contravene the rule in *Shelley's Case* (2). We deal with the rule laid down in *Frog's Case* (1) as a rigid rule of law so long established and acted upon as not to be shaken. It is not however inflexible, and is not to be extended, nor is it to be given effect to in its primitive rigidity if a testator shews by adequate expressions that to do so would be contrary to his intention. I take it then to be part of the lex rei sitæ that a gift or devise to a parent in liferent and after his death to his unborn children in fee confers a fee on the parent from a supposed necessity and leaves a spes successionis only to the children. The rule, however, yields to the addition of restrictive words, and if proper words be added restricting the parent to a liferent—if he takes the fee—it is only in a fiduciary character and to prevent its remaining in pendente, the real fee being in the children. It is not doubted that the use of the terms "allenarly," or "only" or "not otherwise" or "alimentary" after the words "for life" or "in life rent" would be a sufficient expression of the intention of the testator that the parent was to take a life estate or life rent and no more. The application of the rule is excluded not only by such restrictive words but by anything to be found in the gift itself shewing adequately and satisfactorily that the intention of the testator was to confine the gift to a life estate and no more.

In this view the learned Solicitor-General for Scotland and Mr. Rigby called our attention very forcibly to the provisions of the

(1) Mor. Dict. 4262; 3 R. L. C. 602. (2) 1 Coke Rep. 104a, p. 225.

will as to this devise, such as "without impeachment of waste," powers to jointure, to charge portions for children, to lease for twenty-one years, and to make building leases, and to sell with consent of tenant for life, &c., &c.—as plainly shewing that the testator intended to confine the devise to his eldest son, the pursuer, to a life estate alone and gave efficient and adequate expression to that intention by adding provisions which would be wholly unnecessary if he were to take in fee or in tail.

We have now before us the will of a domiciled native of England expressed in the proper language of the country where it was made and we interpret it according to the law of the testator's domicil; but so far as it deals with immoveable property in Scotland its application and the rights of the parties claiming under it are to be determined by the lex rei sitæ. Adopting then, but not extending the rule in *Frog's Case* (1), admitting that according to it the pursuer would take the fee unless the word "allenarly" or some equivalent word is used, or unless there be found in the devise some equivalent expression of the testator's intention to restrict the pursuer to a life estate, I concur in the opinion expressed by your Lordships that the testator has adequately and sufficiently, according to the law of Scotland, indicated his intention to restrict the pursuer to a liferent, and that he takes a liferent only in the estate of Banchor. My Lords, it would be strange indeed if the same words in the same devise, shewing one and the same intention, should be interpreted as to the English estate as giving a life estate, but as to the Scotch estate we should interpret them so as without any necessity for it to give operation to them according to *Frog's Case* (1). We ought not to do so. Neither ought we to say that the devise fails because you cannot give effect to it in all its incidents according to the law of Scotland. We have to ask ourselves, What did the testator mean by the words he has used? and, having ascertained his intention, we give effect to it according to the law of Scotland, as far as may be practicable.

I concur, my Lords, in thinking that the judgment of the Inner House should be affirmed.

(1) Mor. Dict. 4262; 3 R. L. C. 602.

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Asher, Q.C., asked for costs to be allowed the respondent as between solicitor and client, on the ground that he was an officer of the Court, appointed to protect the interests of the children.

Interlocutor appealed from affirmed; the costs of the appeal, as between solicitor and client, to be paid by the appellant.

Lords' Journals, 8th May, 1883.

Agent for appellant: *W. A. Loch.*
Agents for respondent: *Grahames, Currey & Spens.*

[HOUSE OF LORDS.]

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THE SOCIÉTÉ GÉNÉRALE DE PARIS . APPELLANTS;

AND

JOHN GEEN . . . . . RESPONDENT.

Bankruptcy—Composition—Secured Creditor proving for balance of Debt above assessed value of Security—Bankruptcy Act 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*General Rules*, 1870, *Rule* 272.

The effect of rule 272 of the General Rules, 1870, read together with sect. 126 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), is that in composition proceedings under sect. 126 a secured creditor, who proves for the balance of his debt after deducting the assessed value of his security, and afterwards realises the security, must pay to the debtor any surplus realised above the assessed value, after allowing interest upon the assessed value from the assessment until the realisation:—

So *held*, affirming the decision of the Court of Appeal.

APPEAL from an order of the Court of Appeal.

On the 2nd of July 1880 the respondent, a London fruit merchant, filed his petition in the London Bankruptcy Court for liquidation by arrangement or composition. At that time the appellants were creditors of the respondent for a large amount, for which they held as security two cargoes of currants. At the first meeting of creditors on the 29th of July 1880 it was resolved by the statutory majority of creditors that a composition of 4*s.* in

the pound should be accepted in satisfaction of the respondent's debts, 2*s.* to be paid within two months, and the remainder within four months from the final registration of the resolutions. The resolutions were duly confirmed on the 10th of August, and finally registered, under the Bankruptcy Act 1869. The appellants (who voted upon the resolutions on the 29th of July and 10th of August) proved their debt on the 29th of July under the composition proceedings by an affidavit stating the debt at £3515 0*s.* 9*d.*, being the balance of account for money lent &c. by the appellants to the respondent after giving credit for £6947 15*s.* the value of the two cargoes deposited with them by the respondent. The respondent duly paid the appellants the composition upon the debt of £3515 0*s.* 9*d.* The cargoes having been afterwards sold and having realised £8717 8*s.* 9*d.*, the respondent brought this action in the Chancery Division against the appellants claiming, 1. a declaration that he was entitled to the amount which the cargoes produced beyond the £6947 15*s.*, the assessed value thereof; 2. an account of the sales and an order upon the appellants to pay the respondent the said amount with interest at 5 per cent. from the date of the sales; 3. judgment for the balance and interest.

The action was heard before Bacon V.C. who made an order for claims 1 and 2 as prayed by the respondent; in taking the account the appellants to be allowed interest at 5 per cent. on the £6947 15*s.* from the date of assessment until the sales; and for payment by the appellants to the respondent of the sum to be certified by the Chief Clerk.

This order was affirmed by the Court of Appeal (Jessel M.R., Cotton and Bowen L.JJ.) following *Couldery* v. *Bartrum* (1).

July 2, 3. *Davey* Q.C. (*Solomon* with him) for the appellants :—

This is in substance, not in form, an appeal from *Couldery* v. *Bartrum* (1), where however the present point was not argued. The only question is whether, the cargoes having realised more than the assessed value, the surplus must be paid over to the debtor. If this were a bankruptcy the surplus would be payable

(1) 19 Ch. D. 394.

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under rule 100 of the General Rules, 1870, and if a liquidation under rule 272, but being a composition it is not. The latter part of rule 272 does not apply to compositions, and there being no express provision as to composition the inference is that a different result was intended. In composition a surety is not released, because the debtor is discharged by operation of law: *Ex parte Jacobs* (1); and by analogy a security on the debtor's own property is not released. Composition differs essentially from bankruptcy and liquidation in several particulars: *Breslauer* v. *Brown* (2); *Simpson* v. *Henning* (3); *In re Littler* (4). What is the meaning of "satisfaction" in the Bankruptcy Act 1869 s. 126 (5)? In one view the debt can only be satisfied by assigning the security to the creditor as a purchase out and out. If the debt is extinguished the security cannot remain as a security it must become the property of the creditor. The middle clause of rule 272 applies solely to liquidation and is inapplicable to composition, for there is no trustee; the last clause applies both to liquidation and composition, so that if the security had realised less than the valuation, the creditor could not have increased his claim for a composition. The debtor cannot have the advantage both ways. If the debtor is not satisfied he should apply to reduce the proof: *Ex parte Bacon* (6). In another view, the construction

(1) Law Rep. 10 Ch. 211, 213.

(2) 3 App. Cas. 672, 704.

(3) Law Rep. 10 Q. B. 406.

(4) Law Rep. 18 Eq. 249.

(5) Sect. 126 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71): "The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor . . . ."

Rule 272 of the General Rules 1870: "A secured creditor, unless he shall have realised his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security, and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled at any time before realisation of such security by the creditor to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of the security realising a less sum than the value at which he has so assessed the same."

(6) 17 Ch. D. 447.

of the Act is that the debtor is discharged from all suits and proceedings personally, leaving all liens and securities undisturbed, and this is probably the true view. This would clearly be the case if the security were the property of a surety or any third person. If the security is redeemable by the debtor, it is only by paying the whole of the debt. The reasoning of the Court in *Couldery* v. *Bartrum* (1) is based on a fallacy. There is no agreement between the secured creditor and the debtor and the rest of the creditors that any surplus shall be paid to the debtor. Why should the creditors so agree? It is no benefit to them, the surplus not being divisible among them, as it is in bankruptcy and liquidation. If it is a question of agreement, apart from bankruptcy enactment, an agreement among creditors with the debtor to take 10*s.* in the pound, the composition to be in satisfaction of the debt, would leave any creditor at liberty to avail himself of any security he had.

[He also referred to rule 274 and Form 39, as shewing that the rules and forms intended the assessment of the value of a security to be made by the debtor.]

Horton Smith Q.C. and *Fellows*, contended that the decision in *Couldery* v. *Bartrum* (1) was right and for the reasons there given. They also referred to rules 252, 269, 270, and sect. 40 of the Act of 1869, and to *Ex parte Burrell* (2); *Bolton* v. *Ferro* (3); *Ex parte King* (4); *Megrath* v. *Gray* (5). Their arguments sufficiently appear from the judgments.

Davey Q.C. replied.

EARL OF SELBORNE L.C.:—

My Lords, it does not appear to me to be at all necessary, for the purpose of deciding this appeal, to go into the class of questions which were raised in *Megrath* v. *Gray* (5), and *Simpson* v. *Henning* (6), as to the effect of the composition clauses or other

(1) 19 Ch. D. 394.
(2) 1 Ch. D. 537.
(3) 14 Ch. D. 171.
(4) Law Rep. 20 Eq. 273.
(5) Law Rep. 9 C. P. 216.
(6) Law Rep. 10 Q. B. 406, 412, 413, 414.

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provisions of the Bankruptcy Law of 1869 so far as relates to the liability of persons other than the debtor who becomes a bankrupt, or who makes an arrangement, or who enters into a composition. In *Simpson* v. *Henning* (1), Amphlett B. in the Court of Exchequer Chamber, expressed the opinion that it was to be collected, either from that Act alone or from the decisions which had taken place upon it, that the earlier sections of the Act, the 50th and others, which related to that class of questions, were applicable generally to proceedings in liquidation and composition. Taking that to be so, and assuming those authorities to be perfectly right upon the points with which they deal, the only consequence which follows from them, as applied to a case like the present, is that the 126th section must be read and applied according to that construction of those earlier clauses, and they are to be taken into account in determining what is the effect of the word "satisfaction" as it is found in that section. Your Lordships are not called upon now to deal with any question of that sort, nor will anything that you may now say or do affect at all, by implication, the authorities bearing upon that class of questions; but the present question arises entirely between a compounding debtor and a creditor, who is bound by the composition; and the question is how and in what manner he is bound so far as relates to his security.

It seems to me that that question really turns upon the effect of the 126th section and the 272nd rule under the Bankruptcy Act, construed partly according to the words which are found in the section itself, and partly, as to any matters which do not fully enter into it, by the light of general principles and the rights resulting from the state of facts with which those legislative enactments (for I may apply that expression to both of them) deal.

Now I think that in an argument which was in every way deserving of praise, but which was perfectly consistent also with that which had been addressed to us by his learned leader, Mr. Fellows put that upon its right footing. He said, You start with a security, and there is nothing in the Act or in the rules to take from that which was a security before, the nature and the

(1) Law Rep. 10 Q. B. 406, 412, 413, 414.

conditions and the incidents of a security; and a security is that which belongs to the secured creditor only by way of pledge,—which is not his absolute property, but which is the property of the debtor, subject to the right which the creditor has to be thereby secured. It was so before the composition; and unless there is something in the Act to give it a different character after the composition, it remains so then. That Mr. Davey felt the force of that argument was exceedingly obvious, from his declaring in his reply (if I may use an expression derived from another class of subjects) with which horse he would prefer to win. He had advanced in the beginning two propositions, and had put forward in the first instance this, that the true effect of the Act and of the rule was to make the secured creditor an absolute purchaser of his security (in the same way as if there had been a release by the debtor of all right of redemption, or a foreclosure in law), when the creditor had placed a value upon it, and had proved for the difference, and no objection had been made. In the alternative, and as a second proposition, Mr. Davey suggested that if that were not so, and if it retained the character of a redeemable security, then it could only be redeemed upon the terms of paying the full amount of the debt without reference to the amount of the composition, although of course it might follow from that that the proof which had been admitted for the purpose of the composition might be liable to be reduced.

I think that the argument was in the first instance advanced with more confidence than it was at the end, that the creditor was to take the security out and out as something irredeemable, bought and purchased by him at the value which he chose to put upon it; and in my opinion that is an argument which cannot possibly prevail. Therefore it will be necessary to consider the case merely as to the other alternative.

Now the only words in the clause of the Act which seem to me to be of importance are these, that "the creditors of a debtor" may "resolve," in the manner there mentioned, "that a composition shall be accepted in satisfaction of the debts due to them from the debtor." That is to be read with the rule which says (I am now reading only the first part of it and the last, which are admitted to apply to compositions) "A secured creditor, unless

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he shall have realised his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security;" and at the end, "The proof of any such creditor shall not be increased in the event of the security realising a less sum than the value at which he has so assessed the same." It is not disputed that those portions of rule 272 which I have read apply equally and indifferently to all the three cases, of bankruptcy, of arrangement, and of composition; and it seems to me that they determine this, that for the purpose, in the first case, of bankruptcy, in the second case of arrangement, and in the third case of composition, a secured creditor having placed his own value upon his security, having (these are the words of the rule) "assessed his security" at a certain stated value, shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. He retains the benefit of his security; but for the purpose of the proof and other proceedings in bankruptcy, in arrangement, or in composition, he is to be deemed to be a creditor only in respect of the balance. And coming back to the clause of the Act as to composition, when the composition is accepted it is "accepted in satisfaction of the debts due to them" (the creditors) "from the debtor." Taking the two together it appears to me to be perfectly clear that it is accepted in full satisfaction, as between the compounding debtor and a creditor, who is bound by the resolution at all events, of that for which under rule 272 he is to be deemed a creditor, which in this case, inasmuch as he put upon his security the assessed value of £6947 odd and proved for the difference, is £3515. I cannot come to any other conclusion but this, that the composition was accepted in satisfaction of the whole £3515 as much as if it had been paid down in full.

That being so, there remains only the question, what right he had in respect of his valued security. Probably he had no right except to make what he could of that security. But if he was not (and I am clearly of opinion that he was not) a purchaser out and out at his own valuation, of that security, the most that he

could possibly be entitled to make of it was that which the Court below have allowed him, namely, the amount of debt remaining due to him in the sense in which the retention of the security involves a debt remaining due, which had not been extinguished by the composition; £3515 in my view had been extinguished by the composition; all personal claim was gone as to the difference; but he retained the security, and he was entitled to make what he could of it up to the full amount of its assessed value, namely £6947. That was the whole debt for which he retained his security. I do not go into the question of interest, but I am certainly not to be understood as differing from the Court below upon that point. In my opinion, in that position of things, it is exactly the same as if, not under the Bankruptcy Act, but by any arrangement out of Court, the creditor and the debtor had agreed that the debt should be reduced to £6947, and that the creditor should as to that rely upon his security and waive any right of personal action. What would be the effect? That subject to his right to get out of the security the £6947 (I assume with interest) it was still what it had been before, a redeemable property of the debtor. The debtor could go with that money in his hand and ask for his property back again upon paying for it; and if (which is the case that has actually happened) it was realised in the market and produced more, the surplus beyond the £6947 with interest would, upon the principles applicable to the nature of a security given by a debtor to a creditor, and with which there is nothing in the Act or in the rules to interfere, be the property of the debtor.

Now is there any objection to that conclusion (which would be drawn upon general principles if the Act had been silent altogether upon the subject) because in rule 100, which deals with the case of bankruptcy, it is expressly provided that if a surplus is realised it shall go to the trustee, and because in this rule 272 the same thing is expressly provided as to cases of liquidation by arrangement, the words being, "In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value; and the trustee shall be entitled at any time before realization of such security by the creditor to

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redeem the same upon payment of such assessed value?" The fact that there are those provisions applicable to the two cases in which there is to be a duty performed by the trustee does not justify any inference that what otherwise would have been the right of the debtor, who has given the security, to redeem it on proper terms is taken away. It has hardly been contended that it does. If that is so, it seems to me that there is an end of the case; because the result then is that the debtor is entitled, upon proper terms, to redeem the security, that is to say upon payment of the assessed amount, with, I assume, interest on that amount. With regard to the difference, for which proof has been offered, the creditor is bound by the composition. The rule has in effect said that that shall be taken to be the whole debt for the purpose of the composition, and the Act has said that the composition shall be in satisfaction.

The conclusion which I come to is that the order under appeal, and the case of *Couldery* v. *Bartrum* (1) which preceded it, are perfectly right, and that this appeal ought to be dismissed with costs. I move your Lordships accordingly.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I also think that a great many points have been mooted upon which it is not necessary to give any decision at all, and I will merely say at once that I am not to be understood as giving any opinion one way or the other upon a great many things which have been spoken about, but only upon the thing which I shall presently state, which I think is all that need be considered in order to determine this case.

It must be remembered, in the first place, that at common law (I am speaking now without any reference to the Bankruptcy Act) a composition with creditors might be made by an agreement amongst several of the creditors with the debtor that he should be discharged upon the payment of a less sum than the full amount of his debt, upon such terms as those creditors and the debtor made among themselves. It was determined by *Good* v. *Cheesman* (2) (which is the case generally referred to as thoroughly

(1) 19 Ch. D. 394. (2) 2 B. & Ad. 328.

establishing the proposition, though I believe it had been determined by earlier cases), that when there has been such an agreement made between the debtor and several creditors all with each other, it is binding upon each creditor. I may observe that that agreement need not be under seal, and need not unless the agreement embraces in it real estate or something which would bring it within the Statute of Frauds, even be in writing, but may be by word of mouth. Lord Tenterden says that such a case as that is a case "where each creditor is bound in consequence of the agreement of the rest." Lord Wensleydale, then James Parke J., says, "I think a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action." Patteson J. says, "The agreement was entered into by the plaintiff on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him on the faith which every one was induced to entertain of a forbearance by all to the debtor." The point decided in that particular case was that where there has been a mutual agreement, to which the other creditors have been parties, that there should be forbearance by all, the debtor may use it as a defence if one of them comes to him to ask for something more than what the other creditors have agreed shall be taken by all.

It seems to me to follow from that that if there was some security over property, which by the terms of the agreement it would have been—I will not say in fraud of the other creditors but—in violation of the agreement with the other creditors, for a particular man to take to himself, and if he actually got hold of it without suing the debtor he must refund it and refund it to the debtor, for there would be nobody else entitled to ask for it. That is not only what I should have thought would have followed, but it has been actually decided in the case of *Cullingworth* v. *Loyd* (1). That is how I understand it. Whether or no the other terms of the agreement were such that it would be, I will not say in fraud, but in violation of it, to realise the security, must of course depend upon the particular terms of the composition-agreement; but if it is in violation of it I think that *Culling-*

(1) 2 Beav. 385.

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worth v. *Loyd* (1) decides that in equity (and I should have thought that it would be the same at common law) the debtor may take advantage of the agreement made with all the creditors, and insist upon the property being given up to him.

Now having started with that as being the common law, I will come to the statute law. Passing by all the previous statutes, the Act of 1869, following several others, said that a composition-agreement might be still made by the parties voluntarily if they pleased and if they all entered into it. But it went further than that, and said, following another statute which had said it before, that if a certain majority of the creditors agree that there shall be a composition, it shall be as binding upon a non-assenting creditor as if he had been a party to it. There are limitations to that which I need not enter into at present, but that is the general effect of the enactment. It would seem to follow from that that if you can ascertain what the terms of the statutable composition are, then if any one of the creditors gets more than that, in violation of that statutable agreement, he shall, just as he was in a composition at common law, be obliged to refund it, and the person to take it from him would be the debtor and nobody else.

That brings us to what to my mind is the real question, namely, What is the effect of the statutable composition which is given by sect. 126 of the Bankruptcy Act of 1869 and the rules and provisions which are incorporated with it? At the beginning of his argument Mr. Davey spoke as if he might take a single line or two of that 126th section and look at the words there standing by themselves. But in fact the whole scheme of the Act (whether it be a wise or an unwise scheme) is that you are to read the whole Act together. Moreover, there are a great many rules which the Act itself does not prescribe, but which by the 78th section are to have the same force as if they were enacted in this Act. "Any rules so made shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if they were enacted in the body of this Act." So that in order to understand it we must look not only at sect. 126 but at the whole of the Act, and at the whole of the rules in order to see what they mean. Now sect. 126 says that the resolution for a composition

(1) 2 Beav. 385.

must be passed by a majority in number and three-fourths in value, and that "in calculating a majority for the purposes of a composition under this section the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote as in bankruptcy." As nearly as circumstances will admit, you are to follow the same rules as in bankruptcy.

Then come the rules which are incorporated in the Act, and we have to look at the 272nd rule: "A secured creditor, unless he shall have realised his security, shall previously to being allowed to prove or vote state in his proof the particulars of his security and the value at which he assesses the same." The present secured creditor had not realised his security. I may observe that in this particular case I know of nothing that would have hindered his realising his security, if he had pleased, at first; but he had not done so. He comes in and puts a value upon it, and then he is to "be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security." Stopping there, the first question would be, What is to be the effect of his putting that assessed value upon the security? If it had stood there, and if there had been nothing to shew either the one way or the other what the legislature intended should be done with the surplus, there might have been a fair argument as to what should be done with it; but it goes on to say, "In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value; and the trustee shall be entitled at any time before realisation of such security by the creditor to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of his security realising a less sum than the value at which he has so assessed the same." The latter part of the rule is not in terms made to apply to a case of composition. But there are similar provisions which apply to proof in a case of bankruptcy; they are exactly to the same effect though not in terms in this rule 272, and when we look at the earlier part of the 126th section of the Act, as to the value, and find that a secured creditor is to

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be in the same position, as nearly as circumstances will admit, as in bankruptcy, it seems to me that the legislature have in pretty clear terms said that a man who in a case of composition comes in and puts a value upon his security shall be in exactly the same position as a man who does so in a case of bankruptcy or of liquidation.

The legislature have thought fit to say that in bankruptcy and in liquidation there shall be no doubt at all about the matter—that if he gets paid the full amount which he has stated, so much the better for him, but that he shall not have any more. If he gets any more they have said expressly that the trustee shall take it. If it falls out less they have said expressly that he shall not increase his proof in consequence. In the case of a composition with a debtor they have not thought it necessary to say that; and it seems to me that there is a reason for it. However, it would have done no great harm, and it would have saved a lawsuit in this case, if they had said that in a case of composition the debtor should be in the same position as the trustee in a case of bankruptcy or liquidation. But although they have not said it they obviously seem to have meant it; and (as I have pointed out) at common law it would not have been necessary to say it. A man who comes in and puts a value upon his security is bound to take out of that security that value—as far as the security goes it shall be good for that value: if it falls out less it shall be his own folly, as the old lawyers used to call it, for having put too high a value upon it; if it comes over, that is because he has put too low a value upon it, and he shall not benefit by having put too low a value; on the contrary he shall refund that money to the debtor, just as a man would have done to a trustee in bankruptcy or in liquidation. If it is a statutable bargain, then the common law, as I have pointed out, says, the debtor is the man who shall recover the money.

Now it is said that that is not justice. I can see that in some cases there may well be some inconvenience in it. There are a good many cases in which a man can realise his security at once at his pleasure; and there, if he does not choose to realise it but prefers to let it stand, that is his look out. There are other cases in which it may be very inconvenient and may work very hardly

to other people if the security is realised at once, and it may be very desirable therefore for everybody's interest that the security shall not be realised or sold (which would only be a mode of realising it), but shall remain unrealised until a favourable opportunity for realising it occurs. It may be said that it is hard upon a man that he has to come in and put a value upon it then. It seems like what is popularly expressed by the phrase, "Heads I win, tails you lose." It is saying, If it turns out to produce less than the value which is put upon it, you shall bear the loss—if it turns out to be worth more you shall not get the gain. That is very true. At the first blush one would have said that the practical effect of it would be that if that was understood people would always realise their securities; but that is not found to be so. In bankruptcy for a long while it has been undisputed, and nobody can dispute it, for the words of the Act are quite clear, that people who do not realise their securities but who put a value upon them are in that position; but yet they do not realise them. The reason is pretty obvious, namely, that realising the security is a profitable job. For instance those who have two cargoes of currants to sell get a profitable job in realising them, they get paid commissions and expenses and one thing and another, and therefore it is a profitable job to do it; and it is really very desirable for both sides that they should have it. Consequently they keep the securities unrealised until a time when it is convenient to realise them, getting well paid for the work which they do. It seems that in practice that does actually induce people to keep their securities unrealised in such cases, where it would be an advantage in that way; and I have very little doubt that in the present case that led to the security not being realised at once. There are other cases like one of those which were cited (1), where there was a policy of insurance upon which a man put the value of £16, I think, that being its surrender value at the time when he put the value upon it. But when the life dropped the value of the policy was more than ten times what he had put down. In such a case as that he would have had very bad luck, but I think it is clear that in the case of a policy of insurance it would be very much to a man's advantage that it should be realised.

(1) *Bolton* v. *Ferro*, 14 Ch. D. 171.

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But here he does put a value upon his security for the purpose of voting; and then the question is (and that is the only point in the case for decision, and as far as I am concerned it is the only point which I do decide), what is the effect of the composition? I say that the effect of the composition by the statute is this, that he having come in and put a value upon the security in that way is bound not to take more; he may take that value out of the security as far as it goes when realised, and if the security does not produce enough he must suffer the loss. Whether it is worth his while to take the chance of that, it is for himself to consider. But if it produces more than the value which he has put upon it, he is to hand over the surplus. Such is the rule both in bankruptcy and in liquidation, and such I think is the rule which upon the proper construction of the statute and the rules is made applicable in the case of composition; and that being so, it follows from it that the decision of the Court below is right and that this appeal must be dismissed.

LORD FITZGERALD:—

My Lords, I quite concur in the result which has been arrived at and in the reasons which have been given both by the Lord Chancellor and by my noble and learned friend opposite (Lord Blackburn).

Under ordinary circumstances each creditor is at liberty to pursue at his discretion the remedies which the law gives him; but when insolvency intervenes, and the debtor is unable to pay his debts, the position of all parties is altered—the fund has become inadequate, and the policy of the law is to lead to equality. In pursuing that policy the bankrupt law endeavours to enforce an equal distribution, whilst it respects the rights of those who have previously, by grant or otherwise, acquired some security or some preferable right.

Three courses are open under the Act of 1869. 1. Bankruptcy pure and simple; 2. Liquidation; 3. Composition. In the first two the estate of the debtor vests in the statutory trustee; in the third it remains in the debtor unless it be otherwise specially provided. In the present case the creditors and the debtor selected the milder course of composition; and in that event the creditors coming in under the arrangement and accepting

a composition must come in on an equal footing so far as relates to the debt or portion of the debt in respect of which the composition is accepted. The appellants being then creditors for £10,462 15*s.* 9*d.*, and having the security of two cargoes then in their possession, had three courses open to them: first, to hold aloof and trust to their security; secondly, to realise and come in and accept a composition for the difference; and thirdly, to assess the value of their security and prove for the difference; or it may have been open to them to adopt some different arrangement, with the assent of the debtor and his creditors expressed on the face of the composition-resolution. On that last point I offer no opinion. The creditors here, the Société Générale de Paris, adopted the third course, that is to say, they assessed the value of the security which they held from the debtor at £6947 15*s.*, they gave credit for that sum, and proved for the balance, £3515 0*s.* 9*d.* That proof secured to them certain advantages, viz., a right to vote on the resolutions and to regulate the rate of composition. The language of their proof is that "the said balance of £3515 0*s.* 9*d.* is due to the said Société after giving credit for the sum of £6947 15*s.*, the value of two cargoes deposited by the said debtor with the said Société."

What is the effect of what the appellants have done? That is now the question in this case. So far as proof of debts is concerned, bankruptcy, liquidation, and composition run on the same lines; and in all three cases the creditor coming in must assess the value of his security and prove for the balance after giving credit for the assessed value. The rules expressly provide that in the event of the security finally realising more than the assessed value, the creditor is to pay over the excess to the trustee in bankruptcy or in liquidation; but the 272nd rule omits any express provision to that effect in the case of composition, which is the case here. We must then look at the reality of the transaction to see what the rights of the parties are. The effect seems to me to be that the creditor has elected to prove, and take a composition on £3515 0*s.* 9*d.* He has been paid, or he has accepted the composition on, that sum, thereby extinguishing that portion of his demand; and he has further, as it appears to me, with respect to the £6947 15*s.*, elected, and so elected at his

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peril, to rest on his security and on that alone. The result of that would be that immediately on payment of the composition the respondent was entitled to tender the £6947 15*s.*, and any interest in the meantime accruing upon it, and to get in his security. If that is the measure of the debtor's right, it seems to me to follow from it as of necessity that if the security realises more than the assessed value the debtor is entitled to the excess. If we stop short of that, we fail to give full effect to that principle of equality which the law seeks to enforce.

Now as to the omission or apparent omission in the 272nd rule, which provides for the payment of the excess in the case of liquidation but makes no express provision in the case of composition, I can well understand the omission of any express direction in that case for this reason, that in the one case the excess would go to the trustee already appointed under the Act, but in the other case, that of composition, the right of the secured creditor would be regulated by the composition, and it might be that the debtor would not in every instance be entitled to the excess. Hence you find in the 272nd rule that omission which I have pointed out. But in the result it appears to me from the nature of the transaction to lead to the same end; and it would appear highly inconvenient if in the case of bankruptcy and if in the case of liquidation the excess should be paid to the trustee, but in the case of composition the debtor should not be entitled to the same remedy. Though paid to the trustee in the one case, it is eventually and finally for the debtor's benefit in the ultimate distribution of his assets and the settlement of his affairs, and so it ought to be in the case of composition. By the decision to which your Lordships are now giving effect you place composition, as to that excess, on the same foundation as bankruptcy and liquidation.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 3rd July 1883.

Solicitors for appellants: *Michael Abrahams, Son & Co.*
Solicitor for respondent: *William Beck.*

[HOUSE OF LORDS.]

AYR HARBOUR TRUSTEES . . . . . APPELLANTS;
OSWALD . . . . . RESPONDENT.

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1883
July 23.

Harbour Trustees—Compulsory Purchase of Land—Powers under Special Act—Compensation — Invalidity of Agreement purporting to restrain Powers over Land taken—Lands Clauses Consolidation (Scotland) Act, 1845, *ss.* 48 *and* 61.

Where the legislature confer powers on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good; and a contract purporting to bind such a body and their successors not to use those powers is void.

Harbour trustees, constituted for the management and improvement of a public harbour by a special Act, which incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, were empowered to take lands scheduled (which included that part of O.'s land having an unrestricted frontage to the harbour) for the undertaking. While the question of compensation to O. for his land was before the arbiter the trustees lodged a minute agreeing that the conveyance should restrict their use of the ground taken so as not to interfere with the access from the remaining property of O. to the harbour. To this minute O. did not assent. The arbiter found £4900 payable by the trustees as compensation for an unrestricted use, or £2786 if it were competent for the trustees to bind themselves and their successors by the above-mentioned minute. O. raised an action for declarator of an absolute purchase and unrestricted right in the subject, and for payment of the larger sum:—

Held, affirming the decision of the Court below, that the trustees had power under their special Act, now or at any future time, to make erections on the piece of ground taken, which would effectually destroy the frontage of O.'s remaining property to the harbour; secondly, it was not competent to the trustees to dispense with future exercise of their powers by themselves and their successors.

Per LORD BLACKBURN:—If the trustees could bind themselves and their successors by the agreement, and that agreement would prevent O.'s land from being injuriously affected, O., by refusing his assent, could not get compensation for the injury he might have prevented.

APPEAL against an interlocutor of the Second Division of the Court of Session, Scotland.

The respondent, Mr. Oswald, is the heir of entail in possession of the estate of Auchencruive and others, in the county of Ayr. The appellants are the Ayr Harbour Trustees, incorporated by the

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Ayr Harbour Act, 1855, confirmed by the Ayr Harbour Amendment Act of 1879, which incorporated the Land Clauses Consolidation (Scotland) Act of 1845 (8 & 9 Vict. c. 19), the Lands Clauses Consolidation Act, 1860 (23 & 24 Vict. c. 106), and the Harbours, Docks, and Pier Clauses Act of 1847 (10 & 11 Vict. c. 27), except the 25th and 26th sections of the last-named Act.

The question in this appeal has arisen out of proceedings under the Land Clauses Consolidation (Scotland) Act, 1845. Under that Act the trustees gave notice on the 31st of December, 1879, that they required to take a portion of the land belonging to Mr. Oswald for the purposes of the Ayr Harbour Improvement Act, 1879, and had in that notice stated that they were willing to treat for the purchase thereof, "and as to the compensation to be made to all parties for the damage that may be sustained by reason of the works authorized." The piece of ground thus compulsorily taken was in extent 246 decimal parts of an acre, and formed part of a yard about 1·371 of an acre in extent, situated on the north side of the harbour of Ayr, and having a direct and uninterrupted harbour frontage. The portion scheduled as taken formed the portion of the yard which formed the frontage to the harbour. The parties not being able to agree as to the amount of compensation, arbiters were appointed to settle the amount to be paid by the trustees.

The arbiters duly appointed an oversman. While the former were taking the proof, a minute signed by Mr. Thomas Steele, the chairman of the Ayr Harbour Trustees was lodged in the reference. It was in these terms:—"The minuters hereby agree, with the view of saving expense in this reference, that the conveyance to be granted by Mr. Oswald in their favour, of the piece of ground forming the subject of reference, shall be qualified by a declaration, that they shall not erect sheds or warehouses thereon, and that on the portion of said ground immediately adjoining the remainder of Mr. Oswald's yard a road of not less than thirty feet wide shall be formed and maintained by them."

The arbiters having differed it fell to the oversman to decide. He had to decide the two questions, the value of the land taken, as to which award no question is raised, and also the sum of money to be paid under the 48th and 61st sections of the

Land Clauses Consolidation (Scotland) Act, 1845, as compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severance of such lands or otherwise injuriously affecting such lands by the exercise of the Land Clauses Act or the special Act. And it is on this question this action has been brought. The material clauses of the Ayr Harbour Act of 1879 are as follows:—

(4.) Subject to the provisions of this Act, the trustees may make and maintain, in the lines and according to the levels shewn on the deposited plans and sections, the works hereinafter specified, and all proper approaches and other works and conveniences in connection therewith respectively; and may enter upon, take, and use such of the lands delineated on the said plans and described in the deposited book of reference (except as hereinafter provided) as may be required for and in connection with those works, and for the other purposes of the harbour. The works hereinbefore referred to and authorized by this Act are,—

(1.) A slip dock, extending from the southern bank of the river Ayr, at a point about fifty yards northward from the lifeboat house at the harbour, to a point about ninety yards north-westward from Cromwell Cottage, with a drawbridge or swing-bridge across the same near the lifeboat house, and ways, rails, an engine-house, hydraulic and other machinery and appurtenances;

(2.) A road of access and wharf along and adjoining the north quay of the harbour, and the quay on the eastern side of the entrance to the said wet dock, commencing at or near the junction of York Street with North Harbour Street, and terminating at or near the entrance gates of the said wet dock; and

(3.) A drawbridge or swingbridge across the entrance to the said wet dock, at or near the dock gates thereof.

(10.) The trustees may from time to time erect sheds, warehouses, offices, workshops, hydraulic and other machinery, and cranes, and lay down wharves, lines of rails, and sidings, and construct other works and conveniences upon and around the docks, quays, and other portions of the harbour, and make junctions between the said lines of rails and sidings and the Ayr Dock lines authorized by the Railway Act of 1878, and any other lines of railway which may hereafter be formed to the harbour, and may from time to time maintain, remove, and alter the said several works and conveniences: Provided always, that nothing in this section shall authorize the trustees to take any lands otherwise than by agreement: Provided further, that the power hereby conferred of making junctions shall be subject to the provisions of sect. 9 of the Railways Clauses Act, 1863, with respect to junctions.

The oversman, on the 28th of June, 1881, pronounced the following decree-arbitral:—

In the first place, in the event of its being admitted or judicially determined that the said the Ayr Harbour Trustees, either under their Acts or in conse-

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quence of its being admitted or judicially determined that the agreement tendered by the said minute lodged by them in process as aforesaid is invalid, are entitled to build or make erections on the ground taken from the said Richard Alexander Oswald, and thus shut out his remaining ground from a frontage to the street and harbour, I hereby find, fix, and determine, under and in terms of the said nomination, and under and in terms of the said Acts, and in conformity therewith, the sum of £4900 sterling to be the amount to be paid by the said The Ayr Harbour Trustees, constituted as aforesaid, to the said Richard Alexander Oswald, and that for and in respect of and as the value of the said land or property taken as aforesaid, extending to 246 decimal or one thousandth parts of an acre imperial measure or thereby, and as the amount of compensation to be made by the said The Ayr Harbour Trustees to the said Richard Alexander Oswald in respect thereof, and also in respect of all damage done or to be done to the remaining land and property of the said Richard Alexander Oswald by the taking of such land or property, or by the construction of the works of the said The Ayr Harbour Trustees; or, alternatively, in the second place, in the event of its being admitted or judicially determined that the said The Ayr Harbour Trustees are not entitled under their Acts to build or make erections on the ground taken from the said Richard Alexander Oswald, and thus shut out his remaining ground from a frontage to the new street along the harbour, or that the agreement tendered by the said minute lodged in process as aforesaid is valid, I hereby find, fix, and determine, under and in terms of the said nomination, and under and in terms of the said Acts and in conformity therewith, the sum of £2786 12*s.* 2*d.* sterling to be the amount to be paid by the said The Ayr Harbour Trustees, constituted as aforesaid, to the said Richard Alexander Oswald, and that for and in respect of, and as the value of the said land or property taken as aforesaid, extending to 246 decimal or one thousandth parts of an acre imperial measure or thereby, and as the amount of compensation to be made by the said The Ayr Harbour Trustees to the said Richard Alexander Oswald in respect thereof, and also in respect of all damage done or to be done to the remaining land and property of the said Richard Alexander Oswald, by the taking of such land or property, or by the construction of the works of the said The Ayr Harbour Trustees: and further, as consented to by the said Richard Alexander Oswald and the said The Ayr Harbour Trustees, I find interest at the rate of £5 per centum per annum to be due to the said Richard Alexander Oswald on the said sum of £4900, or alternatively on the said sum of £2786 12*s.* 2*d.*, from the 2nd day of February, 1880, till paid: and further, I find the said The Ayr Harbour Trustees liable to the said Richard Alexander Oswald for the expenses incurred by him in the arbitration and incident thereto, in terms of the statutes; and I remit the account thereof to the auditor of the Court of Session for taxation.

As the parties were at issue according to which alternative of the decree-arbital the compensation was to be paid, Mr. Oswald raised this action on the 15th of November, 1881, concluding for decree of declarator, substantially as follows:—

(1.) That the Ayr Harbour Trustees had, by their statutory notice, dated the 31st of December, 1879, taken compulsorily the piece of land in question from

Mr. Oswald absolutely, and without restriction or limitation as to the use to be made of it, and were liable to pay the full value or compensation for the land so purchased and taken, and also the compensation due for the damage done or to be done to Mr. Oswald's other property by the taking of this land, or by the construction of the works of the trustees. (2.) That the trustees under their Acts, and the Harbours, Docks, and Piers Clauses Act, 1847, and other Acts incorporated therewith, were entitled to build or make erections on the land taken from Mr. Oswald, and thus shut out his remaining ground from a frontage to the harbour. (3.) That the minute lodged by the trustees on the 17th of November, 1880, on the second day of the proof in the reference (given above) was incompetent and invalid, and of no effect; and (4.) That the sum of £4900, being the sum found due by the first alternative in the decree arbitral, was the amount due by the trustees.

The trustees lodged defences, in which they admitted their liability for the sum of £2786 12*s.* 2*d.*, but denied their liability for the larger sum.

The respondent averred, inter alia:—

(Cond. 10.) When the Ayr Harbour Amendment Act, 1879, was before the Committee of the House of Lords his counsel proposed for the acceptance of the trustees a proviso to be added to the 10th section of the said Act, in the following terms:—"Provided also that nothing in this Act contained shall authorize the trustees to construct between any part of the lands of R. A. Oswald, Esquire, of Auchencruive, situated on the north side of the harbour of Ayr, and the face of the quay wall in front of such lands, any sheds, warehouses, offices, workshops, hydraulic and other machinery, and cranes or other erections which might interfere with the full and free use of the said road of access and wharf." The counsel for the said trustees refused to accept the said proviso, and with reference thereto observed, "I should like to know why we are to be prohibited from building requisite things on our own property. Is it not the right of all men to build things on their own property?" In accordance with this view, no such proviso was inserted in the Act; but, on the contrary, the said 10th section of the Ayr Harbour Amendment Act, 1879, confers upon the trustees full power to make any such erections or buildings as they may from time deem requisite. The proceedings in the action of declarator, and Lord Young's interlocutor of the 13th of November, 1879, which it is admitted the parties acquiesced in, are referred to. Quoad ultra the counter-statements are denied.

In their answer the appellants stated:—

Admitted that the pursuer appeared by counsel when the Ayr Harbour Amendment Act, 1879, was before the Committee of the House of Lords, and that the proviso quoted was proposed by him, opposed by the defenders, and rejected. Explained that at that time the pursuer claimed a right of property in the roadway then existing between his yard and the river, and that it was on this footing that he proposed the proviso. The defenders believed and maintained that the property of the roadway was not vested in him but in them (the defenders), and opposed its insertion. An action of declarator was subsequently

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brought by the defenders against the pursuer, to determine inter alia the rights of parties in the road. In this action the Lord Ordinary (Lord Young), on the 13th of November, 1879, decided that the roadway formed part of the harbour of Ayr, and was subject to the control of the defenders, but that neither they nor the pursuer had a right of property in its solum.

The material pleas in law for the respondent were as follows:—

(2.) The minute lodged on behalf of the defenders in the course of the proof in the reference is incompetent and invalid, in respect (1.) that it is unauthorized by and illegal under the provisions of the Lands Clauses Consolidation (Scotland) Act, 1845, with regard to the compulsory taking of land. (2.) That the ground taken had been already purchased and taken from the pursuer absolutely and without qualification, by force of the said statutory notice served upon him. (3.) That the arbiters and oversman were bound by the terms of the reference to award compensation for the said ground so taken, and also for the damage done or to be done to the pursuer's remaining land by the taking of the said ground, or by the construction of the works of the Ayr Harbour Trustees thereon; and an award upon any other footing is ultra fines compromissi. (4.) That the said minute is not legally binding upon the Ayr Harbour Trustees. (5.) That the said minute was an illegal and ineffectual attempt to change, in the course of the proof and without notice, the question referred to the arbiters.

The appellants pleaded, inter alia:—

(2.) The pursuer is only entitled to receive the sum awarded under the second alternative finding of the said decree-arbitral, in respect (a) that the defenders are not entitled under their Acts to build or make erections on the ground taken from the pursuer, and thus shut out his remaining ground from a frontage to the new road or street along the harbour; and (b) that their minute of the 17th of November, 1880, is valid and binding upon the defenders.

On the 31st of January, 1882, the Lord Ordinary (1), pronounced an interlocutor in favour of the appellants that only the sum of 2,786*l.* 12*s.* 2*d.* was due.

Against this interlocutor the respondent presented a reclaiming note.

The Lords of the Second Division along with three consulted judges of the First Division, after having heard counsel, in conformity with the opinion of the majority, recalled the Lord Ordinary's interlocutor and ordained the appellants to make payment to the respondent of the larger sum of 4900*l.*, with interest (2).

The Lord President, the Lord Justice Clerk, Lord Mure, and Lord Young, decided in favour of the respondent. And Lord Shand, Lord Craighill, and Lord Rutherfurd Clark, decided in

(1) Lord Kinnear.

(2) 10 Court Sess. Cas. 4th Series, 472.

favour of the appellants, the judges, including the Lord Ordinary, were thus equally divided, four on each side.

On appeal,

July 6, 9, 10. *The Lord Advocate* (*Balfour*, Q.C.), and *Webster*, Q.C., maintained for the appellants that they were liable only for the smaller sum. (1.) Because the trustees were not entitled under their Acts to build or make erections on the ground taken from the respondent, and thus shut out his remaining ground from a frontage to the harbour. They were not left free to exercise all or any of their powers thereupon, but it is provided that the space is to be used by them as a road of access and wharf. If the road is put immediately outside his ground, then his frontage is not shut off, and in their reading of the Acts it must be put in that position.

(2.) The appellants were entitled to bind themselves to the effect stated in their minute, and such a minute was valid and obligatory both as regards appellants and respondent. Where a body of trustees had a large variety of powers, not expressly bound to do all, then it was within the right execution of such powers that for the proper consideration of saving a large sum of money, here £2000, of the parishioners, the trustees could decide permanently to what use a certain piece of land was to be put. There was no reason why such a body should not have the same powers as a prudent man had in the administration of his affairs. They were compelled to have a road somewhere, and even if open to them to place the road next the water, surely they could elect once for all where the road was to be?

Such a body as the appellants could bind their successors, at least for an indefinite period. They submitted that the minute did not make the statutory notice qualified. By the Lands Clauses Act, a proprietor is to receive compensation, certainly for the value of the land taken; and, contingently, under sects. 48 and 61, for a perfectly different element of damage. According to those sections compensation is to be paid for the damage done or *to be* done, and, therefore, no compensation is due where, as here, no damage has been done, and the appellants bind themselves that none shall be done. If the respondent insists on being

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damaged then the maxim applies, volenti non fit injuria. He cannot insist on being injured that he may get money. The appellants were not offering the respondent an easement, they were only prepared to secure him against loss, and therefore against any claim for damage on his part. They commented on *Staffordshire and Worcestershire Canal* v. *Birmingham Canal*, Lords Chelmsford and Westbury's opinions (1); *Taylor* v. *Chichester and Midhurst Railway*. (2)

The Solicitor-General for Scotland (*Asher*, Q.C.), and *Davey*, Q.C., for the respondent, were relieved from arguing that the appellants had power to make erections on the ground taken so as to exclude the respondent's remaining ground from the harbour frontage. As to the minute, they contended that it was perfectly invalid, and ultra vires; because the appellants, being Harbour Commissioners acting under a public trust, could not impose restraints which would prevent the trustees in all time coming from using their statutory powers as Harbour Commissioners for the public benefit. They could not, like private individuals or a company working for profit, act as they please. Their powers are conferred by, and must be exercised in conformity with, their statutes. They could not have got this land from Mr. Oswald unless under their statute, and the notice to take developes on service into a complete right to the land and an absolute sale; and having got the land, sect. 10 of the Act of 1879 applies to it, and they and their successors have power to use such land for the erection of warehouses, sheds, &c., and also, under sect. 4, to use such land for any harbour purposes. Such then being their powers, they propose to renounce certain of these powers, and to impose on the ground a restraint of the nature of a well-known servitude against a particular class of buildings in favour of the adjoining land. In fact the minute was an attempt to divest the trustees—a fluctuating body—of their statutory right in a certain portion of the ground. This was altogether ultra vires, no such power is given by the statutes to the appellants, and there is no common law rule or principle which enables statutory trustees in the position of the appellants to renounce on behalf of their

(1) Law Rep. 1 H. L. 254. (2) Law Rep. 4 H. L. 628.

trust the powers given them by statute for public purposes: *Staffordshire and Worcestershire Canal* v. *Birmingham Canal* (1); *Mulliner* v. *Midland Ry. Co.* (2) applied here.

Certainly, after the notice, the amount of compensation remained to be fixed from the evidence produced before the valuation tribunal; but it is settled that the notice fixes what is taken, and the conditions under which alone it can be taken, namely as a certain quantity of land purchased absolutely without restriction as to its use for the statutory purposes; and the only question referred to the arbiters is what is due in respect of such compulsory taking. The only power such arbiters possess is to take evidence as to the value of what has been already taken.

[The following cases were referred to in the respondent's printed case:

(A proposal to restrict statutory powers, ultra vires): *Llanelly Railway and Dock Co.* v. *South Wales Ry. Co.* (3); *Rochdale Canal* v. *Radcliffe* (4); Brice's Ultra Vires, 2nd Ed. pp. 128, 130; *Bostock* v. *North Staffordshire Ry. Co.* (5). (Nothing but an absolute sale is authorized): *Bird* v. *Great Eastern Ry. Co.* (6); *Pinchin* v. *London and Blackwall Ry. Co.* (7). (Notice constitutes a statutory contract): *Laing* v. *Caledonian Ry. Co.* (8); *Campbell and Others* v. *Edinburgh and Glasgow Ry. Co.* (9); *Forth and Clyde Junction Ry. Co.* v. *Ewing* (10); *Mackenzie* v. *Inverness and Aberdeen Junction Ry. Co.* (11); *Caledonian Ry. Co.* v. *City of Glasgow Union Ry. Co.* (12); *Lockerby* v. *City of Glasgow Improvement Trustees* (13); *Rex* v. *Hungerford Market Co.* (14); *Stone* v. *Commercial Ry. Co.* (15); *Tawney* v. *Lynn and Ely Ry. Co.* (16);

(1) Law Rep. 1 H. L. 254.
(2) 11 Ch. D. 611.
(3) 14 Q. B. Rep. Q.B. 902.
(4) 18 Ibid. Q.B. 287.
(5) 5 De G. & Sm. 584; 4 E. & B. 798.
(6) 34 L. J. (C.P.) 366.
(7) 5 De G. M. & G. 851.
(8) 9 Court Sess. Cas. 2nd Series, 70.
(9) 17 Court Sess. Cas. 2nd Series, 613.
(10) 2 Court Sess. Cas. 3rd Series, 684.
(11) 4 Court Sess. Cas. 3rd Series, 810.
(12) 7 Court Sess. Cas. 3rd Series, 959.
(13) 10 Court Sess. Cas. 3rd Series, 971.
(14) 4 B. & Ad. 327.
(15) 1 Rail. & Can. Cas. 375.
(16) 16 L. J. (Ch.) 282; 4 Ry. & Can. Cas. 615.

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Haynes v. *Haynes* (1). (Only question to be entertained by the arbiter is what compensation is to be paid for it as so taken): *In re Byles and Ipswich Dock Commissioners* (2). (After notice subject-matter of the reference cannot be varied): *Sparrow* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (3). (After notice owner debarred from selling): *Metropolitan Ry. Co.* v. *Woodhouse* (4). And (no interest created after service of notice is a subject for compensation); *Marylebone Improvement Act, Ex parte Edwards* (5); *Carnochan* v. *Norwich and Spalding Ry. Co* (6); *City of Glasgow Union Ry. Co.* v. *M'Ewen & Co.* (7). (A notice to take an easement or servitude would be invalid): *Macey* v. *Metropolitan Board of Works* (8).]

The Lord Advocate, in reply.

LORD BLACKBURN (after stating the difference of opinion in the Court of Session):—

I need hardly state that where there is such an even division below, the case is one of doubt, and requires careful consideration. [His Lordship then quoted the notice to take.]

This had the effect of a purchase by the trustees absolutely of the piece of ground; and the trustees and Mr. Oswald not being able to agree as to the amount of compensation it fell to be settled by arbitration, the arbiters duly appointed an oversman who had all the powers given by the Lands Clauses Consolidation (Scotland) Act, and no more.

What the oversman had to determine was not only the sum of money to be paid for the purchase of the land actually taken, as to which no question is now raised; but also, to quote the words of the 48th and 61st sections of the Lands Clauses Consolidation (Scotland) Act, "the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of

(1) 1 Dr. & Sm. 426. 7 Jur. N.S. 595
(2) 25 L. J. (Ex.) 53.
(3) 2 De G. M. & G. 94.
(4) 34 L. J. (Ch.) 297. 11 Jur. N.S. 747.
(5) Law Rep. 12 Eq. 389.
(6) 26 Beav. 169.
(7) 8 Court Sess. Cas. 3rd Series, 296
(8) 33 L. J. (Ch.) at p. 381. 10 Jur. N.S. 333.

the lands by reason of the severing of the lands taken from the other lands of the said owner, or otherwise injuriously affecting such lands by the exercise of this or the special Act."

The clauses of the special Act, "The Ayr Harbour Amendment Act, 1879," which are material, are the following:—[sections 4 and 10, set out ante, p. 625.]

I think, and I believe no one of the eight judges below expresses a contrary opinion, that the trustees, though taking the land for the main purpose of making a road of access and wharf along and adjoining the north quay of the harbour, as described in sect. 4, sub-sect. 2, are not restricted from using from time to time parts of the land so taken for the purposes mentioned in sect. 10. I do not think they have unlimited power to erect across that land continuous warehouses or sheds, so as to intercept all access along that quay, but so long as they give effect to the main purpose they may and ought to make such erections as they, in a bonâ fide exercise of their discretion, think for the benefit of the harbour, and if, in a bonâ fide exercise of their discretion, they think it fit to make them on the portion of land taken from Mr. Oswald, there is nothing in the Act to prevent their doing so, even though the effect should be to deprive his remaining land of a frontage to the new road and of access to the quay. Such a deprivation of frontage would, beyond controversy, be an injurious affecting of Mr. Oswald's land.

I think the oversman, in estimating the compensation for such injurious affecting, ought to take into account very much the same considerations as those which, in case Mr. Oswald were selling it, would influence a purchaser who wanted it for a purpose requiring the use of the frontage. Such a purchaser would give a higher price if convinced that the trustees could not legally interfere with the frontage; a smaller price if the right to use the frontage was liable to be injured by an exercise by the trustees of powers which he was convinced they would not, or at least were very unlikely to, ever use; and a much smaller price if he thought it probable that they were likely to exercise such powers, if, indeed, in the case last supposed, he would buy at all. The oversman is to fix the sum. In cases where, to adopt Lord Young's phrase, there is "a possible and more or less probable injury," I do not think he is bound to act on the supposition that

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the trustees will exercise their powers in the way most injurious to the land, but he is to fix the sum at what seems on the evidence a fair estimate of the probabilities. In doing so, he may over estimate the probabilities, or not estimate them high enough, but the Court has not the jurisdiction, nor, if it had the jurisdiction, has it the materials for reviewing his estimate.

But in this case the trustees, during the course of the arbitration, endeavoured by a minute to fix once for all the way in which they and their successors in office would use their powers. And if they could at that time bind themselves by a bargain with Mr. Oswald, if he had agreed to it, and that agreement would prevent his land from being injuriously affected, I should be unwilling to hold that he could, by refusing his assent to that agreement, get compensation for the injury which he might have prevented. As Lord Shand says, "he cannot insist on being injured that he may get money." There are great technical difficulties in the way of working out this, but if I thought that his assent to the minute would have made the minute effectual to prevent the trustees and their successors from using their powers so as to injuriously affect the lands, I should have tried to overcome them. But I do not think that if Mr. Oswald had assented to the minute it would have bound the successors of the present trustees.

I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal* (1), and on which the late Master of the Rolls acted in *Mulliner* v.

(1) Law Rep. 1 H. L. 254.

Midland Ry. Co. (1). In both those cases there were shareholders, but, said the Master of the Rolls, at p. 619, "Now for what purpose is the land to be used? It is to be used for the purposes of the Act, that is, for the general purposes of a railway. It is a public thoroughfare, subject to special rights on the part of the railway company working and using. But it is in fact a property devoted to public purposes as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose."

This reasoning, which I think sound, is à fortiori applicable where there are no shareholders, and the purposes are all public.

Much stress was laid, both in the judgments below and on the argument at the bar, on the supposed hardship of obliging the trustees to buy and pay for the whole interest in the land when the purchase of a more limited interest would be cheaper, and would answer the purposes of the trust as well. I think that was a matter to be considered and provided for when passing the bill through Parliament.

I do not know whether the legislature would have passed an Act giving the promoters power, at their option, to take the whole interest in the land or a more limited interest. They were apparently not asked to do so, and they certainly have not done so. But it appears that there was an endeavour to obtain for Mr. Oswald a proviso which, if it had passed, would have prevented the possibility of his land being injuriously affected by the exercise of the powers in question, and would therefore have prevented his claiming any compensation for such use.

It is stated and admitted in the 10th condescendence and answer, that when before Parliament the counsel for the respondent sought to add to the 10th section a proviso in the following terms:—"Provided also that nothing in this Act shall authorize the trustees to construct between any part of the lands of R. A. Oswald, Esq., of Auchencruive, situate on the north side of the harbour of Ayr, and the face of the quay wall in front of such lands, any sheds, &c., which might interfere with the full and free

(1) 11 Ch. D. 611.

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use of the said road of access and wharf," and that the counsel for the trustees successfully opposed it. I do not think this can have any effect on the construction of the Act. Whatever powers the trustees had given them by the Act as it passed they may exercise, and whatever rights Mr. Oswald has under the Act as it passed he may insist on, just as much and no more than if no such proviso had been proposed and rejected. It does, however, appear that at that time both parties thought it not only possible but probable that the trustees would exercise their powers in such a way as to injuriously affect the respondent's land. This, I think, rather bears on the question whether the oversman may not have over estimated the probabilities when fixing the compensation; a question which (as I have already said) we have neither jurisdiction to enter upon, nor materials to enable us to decide.

There is only, I think, one further point on which I think it necessary to remark. The trustees are under no obligation to make erections on any part of the land. If they in the bonâ fide exercise of their discretion think it best for the interest of the harbour to leave the portion of the land between Mr. Oswald's land and the quay wall open as a road of access and wharf, they may do so. If they think it best to make erections there not inconsistent with the main purpose of leaving a road of access from York Street to near the gates of the wet dock, though injuriously affecting the frontage of Mr. Oswald's remaining land, they may do so. And it was strongly argued that the trustees at the present time in the exercise of their general administrative powers may fix what is to be done now; and that if they do so they practically fix what will be done for all time to come; if the present trustees now lay out an open road thirty feet wide, along the inner side of the land, erecting what erections they think advisable on other parts of the wharf, their successors can hardly be supposed likely to change this plan.

I think that it is quite true that as to all such things as from their nature must be done once for all at the beginning of the trust, the present trustees must bind their successors. And if the Act had required the trustees to make and maintain a road thirty feet wide upon the land taken along the north quay, I am by no means prepared to say that their successors could have closed the

road they laid out and made a new one; something would depend on the very terms of the enactment. But such is not the enactment in this Act. And though I think that the mode in which the trustees now lay out the road of access and wharf will probably have great influence on the exercise of the discretion of their successors, and is therefore an element which ought to be, and I do not doubt was, considered by the oversman in fixing the fair compensation for the probable injury to the frontage, it goes, I think, no further.

I come therefore to the conclusion that the interlocutor appealed against should be affirmed and the appeal dismissed with costs.

LORD WATSON:—

I am of opinion, also, that the judgment under appeal must be affirmed.

If the appellants have not the right which they assert to fix and determine now and for all time coming the particular statutory uses to which the land compulsorily taken by them from the respondent is to be turned, their case entirely fails.

If, however, the right thus asserted by the appellants be conceded or established the question arises whether they are entitled to diminish the amount of compensation payable to the respondent, by imposing an obligation upon themselves and their successors in the harbour trust to use the land taken by them for no other purposes than those specified in the minute of the 17th of November, 1880. On the one hand it was not disputed that by the provisions of their special Act, and of the Lands Clauses (Scotland) Act, 1845, therewith incorporated, the appellants must take and pay for the whole proprietary interests of the respondent, and that they cannot reduce the compensation payable to him by giving him back an integral part of what they are under obligation to take. On the other hand it was mutually conceded in argument that statutory trustees like the appellants may, whenever they have the power, so limit and define the uses which they and their successors in office are to make of the ground taken by them as to minimise the injury which will be occasioned by the execution of their works to the lands from which that ground is

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dissevered. Accordingly the controversy between the parties, assuming the validity of the minute, was narrowed to this point. The respondent maintained that to give effect to the minute would be, in substance, to give back to him part of the proprietary interest taken, in the shape of a predial servitude non ædificandi; whilst it was contended for the appellants that the undertaking given in their minute, though in form somewhat analogous to the creation of a servitude right, was in reality nothing more than a declaration, binding on themselves and their successors, of the harbour purposes for which the ground was to be used in perpetuity.

I do not consider it necessary to determine which of these views, as to the character and effect of the minute, ought to prevail, because I am of opinion that the appellants have not the power to subject future trustees of the harbour to the restraints which the minute professes to impose upon them. All the judges in the Court below held, and in my opinion rightly held, that their special Act gives the appellants power, now or at any future time, to make erections upon the piece of ground taken from the respondent, which would effectually destroy the frontage of his remaining ground to the harbour, but they differed as to the competency of the appellants to dispense with the future exercise of that power by themselves or their successors in the trust. It humbly appears to me that the Lord Ordinary, and the learned judges who constituted the minority in the Inner House, in coming to the conclusion that the appellants could, by a present resolution, deprive the harbour trustees, in all time to come, of the right to exercise the powers conferred upon them by statute, did not sufficiently keep in view the very specific provisions of the "Ayr Harbour Amendment Act, 1879."

The 4th section of the Act empowers the trustees to make and maintain, in the lines and on the levels shewn on the deposited plans, the works thereinafter specified, "and all proper approaches and other works and conveniences in connection therewith respectively;" and authorizes them to take and use such of the lands scheduled (including the piece of ground taken from the respondent) as may be required in connection with those works, "and for the other purposes of the harbour." The works so referred to

are particularly described in the two sub-sects. forming part of sect. 4; and the second of these sub-sects. includes "a road of access and wharf, along and adjoining the north quay of the harbour, and the quay on the eastern side of the entrance to the said wet dock." The only works shewn by the deposited plans, upon the respondent's land which has been taken, are the said "road of access and wharf;" but neither on the plans, nor in the words of the Act, is there to be found any indication of what part of that land is to be used as road and what as wharf. That is a matter left to the discretion of the trustees. "The other purposes of the harbour," for which the land in question was to be used, are defined in the 10th section of the Act. It provides that the trustees "may from time to time" erect sheds, warehouses, offices, workshops, &c., upon the docks, quays, and "other portions of the harbour," and also that they "may from time to time" maintain, remove, and alter the said several works and conveniences. The Lord Advocate ingeniously argued that these enactments are permissive, and not imperative, and consequently that the powers which they confer might be waived by the trustees; but the fallacy of such reasoning is transparent. Section 10 is permissive in this sense only, that the powers which it confers are discretionary, and are not to be put in force unless the trustees are of opinion that they ought to be exercised in the interest of those members of the public who use the harbour. But it is the plain import of the clause that the harbour trustees for the time being shall be vested with, and shall avail themselves of, these discretionary powers, whenever and as often as they may be of opinion that the public interest will be promoted by their exercise.

The case, according to the view which I take of the provisions of the Harbour Act of 1879, stands thus: The statute expressly says that the trustees shall, in all time coming, possess, and may, whenever they think fit, exercise the power of altering the condition of the harbour works ex adverso of the respondent's land, so as to exclude direct access from it to the harbour. The minute lodged in the arbitration by Provost Steele, as representing the present body of trustees, especially declares that in future the trustees shall not possess, or at least shall not exercise, that power. To give effect to the terms of the minute would, in my

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opinion, be to affirm that the appellants have power to repeal the provisions of the Act, in so far as these apply to the land taken from the respondent; and as I can find no indication of an intention on the part of the legislature to vest any such power in the appellants, I think the minute is altogether invalid.

LORD FITZGERALD:—

I concur in the judgments of the noble and learned Lords, but do not desire to rest my opinion on the technical though substantial ground that the defenders had no right to create an easement or servitude over the land acquired by them under the powers of the Ayr Harbour Amendment Act of 1879. I prefer adopting the language of the contention of the defenders "that the substance of the proposal by the harbour trustees was not to constitute a servitude, but to bind themselves to abstain from an apprehended use, injurious to Mr. Oswald's adjoining land, so that they should not be required to pay him compensation on the footing that such use was open to them."

When the defenders shall have completed their title to the land in question, they will acquire that land in full ownership for the purposes defined by their special Act and cannot lawfully accept it otherwise. My Lords, I am of opinion that having so acquired that land for the purposes expressed in sect. 4 and amplified in sect. 10 of their special Act, they have no power in law to preclude themselves or their successors from the exercise of their statutable powers over it, as should be from time to time required for the purposes of the harbour. The minuters are not bound by their own minute.

I am further of opinion that even if the minute was not ultra vires, yet the minuters had no right at the time, and under the circumstances stated, to force on the pursuer a minute of doubtful import and effect in lieu of the compensation to which he was otherwise entitled.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 23rd July, 1883.

Agents for appellants: *Grahames, Currey, & Spens.*
Agent for respondent: *W. A. Loch.*

[HOUSE OF LORDS.]

CAMPBELL . . . . . APPELLANT; H. L. (Sc.)
WARDLAW AND OTHERS . . . . . RESPONDENTS. 1883
July 6.

Liferent and Fiar—Unworked Coal Mines—Liferentrix not entitled to Profits though opened during her Life—Testator's Intention—Trusts (Scotland) Act, 1867 (30 & 31 *Vict. c.* 97), *s.* 2, *sub-s.* 3.

A testator directed his trustees to pay to his wife "the whole annual produce and rents of the residue of his estates both heritable and moveable." Coal and iron mines were leased by the testator before his death. His trustees afterwards leased others. In a question whether the wife was entitled to the rents of those opened after the testator's death:—

Held, affirming the decision of the Court below, that in law she was not entitled; and that there was nothing in the trust deed which shewed that she was to have such a benefit:

Also, the Trusts (Scotland) Act of 1867 was merely an Act to facilitate administration without disturbing the interests of the beneficiaries under the trust, i.e., it enables trustees who also have the testator's authority to let minerals, to let them for the customary period instead of a lease for an uncertain period, namely a tenancy for life.

Whether the power to let minerals on long leases under sub-sect. 3, sect. 2, of the Act includes a power to open up and let new mineral fields not decided.

APPEAL from a judgment of the First Division of the Court of Session, Scotland, on a special case.

The late Sir George Campbell was in possession of the estate of Garscube and other lands in the county of Dumbarton. As proprietor he granted leases in favour of certain mineral tenants, of (1) the coal in Garscube, and (2) the coal and ironstone in several of his other lands. On the 17th of February, 1874, Sir George died, leaving no issue, survived by his wife, the present appellant. He left a trust disposition and settlement by which he conveyed his whole estate to trustees—who are now the present respondents—for certain trust purposes. The material part of the fifth clause of the trust disposition was in these terms: After payment of my debts, funeral expenses, and the legacies, provisions, and others foresaid, my said trustees shall pay over to the said Lady Margaret Campbell, my wife, in the event of her

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surviving me, "the whole annual produce and rents of the residue and remainder of my means and estate, heritable and moveable, during all the days and years of her life;" but declaring that in the event of Lady Campbell entering into a second marriage her liferent enjoyment of the said means and estate shall immediately cease.

In 1879 the trustees, in virtue of the 3rd sub-section of the Trusts (Scotland) Act, 1867 (30 & 31 Vict. c. 97), granted a lease for twenty-one years, from Whitsunday, 1878, in favour of Messrs. Addie & Sons, of the ironstone and other minerals in portions of the lands of Garscube which had never previously been let. Since Sir George Campbell's death the trustees have paid to his widow, as part of the annual produce and rents of the free residue of the trust estate, the rents received under the leases current at that date, but they have refused to pay her more than the interest on the rent or lordship payable by Messrs. Addie & Sons on the ground that such rent or lordships accruing from mines opened since the truster's death must be treated as capital forming part of the residue of the estate. In these circumstances the question was raised by special case whether Lady Campbell was entitled under the fifth clause of her husband's testament to the fixed rent or lordships paid by Messrs. Addie & Sons.

The First Division on the 15th of March, 1882, decided in favour of the respondents (1).

(1) 9 Ct. Sess. Cas. 4th Series, 725. The Lord President said inter alia:—"There is nothing peculiar in the deed from which we can gather the testator's intention. The question therefore must be settled upon a rule of law which, if not established by positive decision, appears to run through all the cases, and has been taken to be settled in all the recent examples. Where a mineral-field has been opened up and made part of the fruits of the soil, or has provided an income during the lifetime of the testator, the liferenter of the estate is entitled to continue to have these fruits as part of the free income of the estate. But where it has not been opened up in the lifetime of the testator, but has become a source of revenue since his death, the liferenter is not entitled to enjoy it."

"By the Trusts Act, Lady Campbell cannot be held to be entitled to the benefit of the produce of a mineral field which was not worked during her husband's lifetime.

"But then it is said that the granter must be held to have had in view the powers conferred by the Trusts Act, 1867, and the possibility of the opening of new mines by the trustees under these powers. I am not altogether clear whether the power to let minerals

July 5, 6. *Davey*, Q.C., and *A. Graham Murray*, maintained for the appellant that on a true construction of the fifth clause she was entitled to have paid to her by the trustees the whole mineral rental of the estate, and that she was not limited to the rental of such mines as were opened by the testator. In the earliest of the Scotch reported decisions it was held that the liferentrix had the right of a going colliery, not only for her own use but for sale (1). No doubt a liferenter simply described as such had no right to open fresh mines (2), but in all cases the intention of the testator must prevail: *Waddell* v. *Waddall* (3); *Guild's Trustees* (4); *Wardlaw* v. *Wardlaw's Trustees* (5).

The intention of the testator here was plainly that the appellant should have something more than a mere liferent, for instead of using the word "liferent," which at the least was a word having a particular meaning in the law of Scotland, giving a right to

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upon long leases, under sub-sect. 3 of sect. 2 of the Trusts Act, includes a power to open up and let new fields or not. But I can quite understand that a testator may be, like myself, in doubt as to the effect of the Act in this matter. If, therefore, a testator makes such a bequest of the liferent of his estate as we have in this deed, are we to assume that he has left it to be settled upon a construction of the Act of Parliament, what is the extent of the bequest? I think that, if we were to listen to that contention, we should be giving to the Act of Parliament the effect of introducing a change in the law beyond what the legislature contemplated, and we should further be obliged to ascribe to the grantor of the deed a purpose and an intention which he may never have had. I can quite understand that if the truster had given a power to open new minerals it might have been argued that a mineral field which had been opened up under the directions of the truster may have been intended to add to the income of the widow, and therefore, in the absence of any such power being given by the truster, I think that the general rule of law must apply."

Lord Shand said: "In regard to the powers given by the Trusts Act I think it right to say that I do not entertain any doubt that a power to lease minerals never before worked is included. The words of the section (sect. 2 and sub-sect. 3) are as plain and unrestricted as they can be. It cannot, I think, be suggested on any reasonable ground that the words used are to be confined in their meaning and application to minerals previously let."

(1) About 1503, *Robert Seton and his Mother*, 2 Craig, 2, 8, 17; see also Stair, 2, 3, 74, for Craig's dictum, and Erskine, vol. i., note to p. 464.

(2) See *Lady Preston*, 1677, Mor. 8242; *Belschier*, 1779, Ibid. 15863; *Swindon*, Feb. 1, 1814, F.C.

(3) Jan. 21, 1812, F.C.

(4) 10 Court Sess. Cas. 3rd Series, 911.

(5) 2 Court Sess. Cas. 4th Series, 368.

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some subjects and not to others—the testator used general words in no way limited. Also the element of intention was evinced by the testator's working the minerals himself. Again, he must be presumed to have the knowledge that his trustees were likely to open fresh mineral fields, the Act of 1867 having passed long before his death. The trust deed must be construed as if the power given by sect. 2 of the Act of 1867 was included. But, at all events, if the Act of 1867 was only an administration Act, the testator had appointed his trustees to carry out any acts of administration, and opening mines is an act of that description. The trustees had made the lease here, and the minerals had been converted into produce and fruits. Either the lease was good or bad; if good, then the appellant should have the produce from that fruit-bearing estate.

[They also commented on *Daly* v. *Beckett* (1); *Wellwood* v. *Wellwood* (2); *Douglas* v. *Scott* (3); Coke upon Littleton, 54 b.]

The Lord Advocate (*Balfour*, Q.C.) and *G. L. Macfarlane*, for the respondents, were not called upon.

LORD BLACKBURN:—

In this case we do not think it necessary to call upon the counsel for the respondents. Everything has been said upon the appellant's side which by any ingenuity could be said, but without ever producing in my mind the slightest doubt, I must own, as to the propriety of the decision in the Court below.

The principle upon which the whole matter depends is the same both in English and in Scotch law, and I should be inclined to think that it would be very much the same in every country, for it is the nature of things that causes it to be so. Where there is "produce," such as minerals, which, when once taken away, is never replaced, it is in a very different position from, I may say, apples or fruits of that kind, which are annually reaped and which replace themselves. That they are different in the nature of things is obvious enough. When there is an

(1) 24 Beav. 114.
(2) 10 Ct. Sess. Cas. 2nd Series, 1480, and 11 Ibid. 248.
(3) 8 Ibid. 3rd Series, 360.

estate consisting partly of minerals or things of that sort, and partly of annual produce in the other sense, such as fruits and the like, and that estate comes to a person with a limited interest, the remainder being in somebody else, the question would arise, What is to be done with the produce? The law of England, and I believe of every country, the feudal law and the civil law too, would say that in that case the person who has the limited interest takes, beyond all doubt, the annual produce, the grass, the apples, and things of that sort, and applies them to his own use as he pleases, as long as his interest lasts. But it would follow, from the strict rule which I have mentioned before, that minerals, whether the mines had been opened or not, would remain a part of the soil belonging to the person who was to have the ultimate interest in the soil: the remainderman, as he would be called in England, or the fiar as he would be called in Scotland, would take them all.

But very early there was introduced this in favour of the person who takes a limited interest,—that where, at the time when the person having a limited interest comes into possession, minerals have been already opened, whether coal-pits or quarries, or the like, the person who has that limited interest shall be at liberty to continue to work those coal-pits or quarries which have already been opened. That was laid down by Lord Coke in Coke-Littleton, at p. 54 b (1) (case dated 1344), and sometime afterwards in a case which has been cited from Craig (2) (dated 1503), it was laid down in Scotland in precisely the same way that a person who has a limited interest may continue to work opened pits. I do not say anything at all about applying timber to building houses, or using minerals, such as lime, for improving land. That introduces different principles, and I pass it by.

I am inclined rather to agree with what Mr. Davey's argument implies, that the original ground of all that was that there was supposed to be an irresistible indication of intention that he who conveyed the property for a limited time to a person with a limited interest intended him to work the opened minerals. I

(1) Coke's reference is to 17 Edw. 3, 7 (1344); 9 H. 6, 66.

(2) *Robert Seton and his Mother:* Craig's reference is to cap. 77, Parl. 6 Jac. 4 (1503).

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am inclined to think that it was upon that ground that the Courts originally acted throughout; and I quite agree with what Mr. Davey has said, that where there is a sufficient appearance of intention in the instrument to shew either that that should be restricted or that it should be extended, that intention would govern. But it must be a sufficient indication of intention. I do not agree at all with what Mr. Davey has repeatedly said, and made in fact the basis of his argument, that in Scotch law it turns at all upon the technical meaning arising from the word "liferenter." I do not think that that was the reason or substance of it, or that that was at the bottom of the matter at all; but I believe that it was because it was presumed to be the intention of him who conveyed the property, either generally or specifically, for a limited interest, with opened mines upon it, that the person having that limited interest was to be at liberty to work those opened mines.

And when it is said that there is to be a separate and different construction put upon the trust when, as it is here, it is a trust to trustees to pay over to the truster's "wife in the event of her surviving me the whole annual produce and rents of the residue and remainder of my means and estate" during her life, I cannot put any different construction upon it, or think that the testator intended a different construction to be put. If, instead of saying, "My said trustees shall pay over to my said wife the whole annual produce and rents of the residue and remainder of my means and estate during her life," he had said that they were to give her an interest as liferentrix in the minerals lying underneath the surface of his estate, the two things would have meant the same. In the one case it would have been expressly saying that she was to take the annual produce and rents, and in the other case it would have been making her a liferentrix, who would take the annual produce and rents. In either case it would remain to see whether an unopened mine was turned into produce and rents or not.

Now the numerous cases which bear upon this subject, beginning apparently with the case in Craig, and going downwards, all say that if a mine is opened, unless there is something to shew a contrary intention, which there may well be, the intention

is that the person with a limited interest shall take the annual produce. I do not think that it would be confined to a life-renter, but if the limited interest were for a term of twenty years I should be inclined to suppose that it would be much the same thing, although I do not know that that has ever been decided. Unless restrained by something or other which shews a contrary intention, or by the general law with regard to exhausting minerals and so on, which may restrain it, the person with that limited interest would take the opened minerals, but he would not take the unopened minerals. It seems to me that that would be the meaning of those words taken by themselves.

Then, is there anything here to shew an intention in fact that the appellant was to have the benefit of the unopened minerals if they were thereafter opened? Now the first thing that Mr. Davey argued was, that inasmuch as the testator in his lifetime opened some minerals in some parts of his estate, it is to be assumed that his intention was to open the other minerals in the other parts of his estate, and that the consequence of his having opened the minerals in a part of his estate is that there is no difference at all between opened and unopened minerals, but that all are to be considered as if they had been opened in his lifetime, because his opening a part shews that he intended in due course to open the others afterwards. I do not myself think that that is a fair conclusion as to his intention, and I think that it is quite clear that to presume such an intention as that would be at once to repeal and make of no effect all the numerous cases which draw a distinction between opened and unopened mines, for there would be none whatever, and if any minerals had been opened at all it would be the same as if they had all been opened.

Further than that, it was argued that there was such an intention, because the Act of 1867 had been passed, which gives to trustees the power, amongst other things, "to grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals." That power is given to trustees whether the trust deeds under which they are appointed were executed previously to the Act or subsequently to it; but in all cases such a power is given to trustees,

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not for the purpose of altering the incidents of the property, but, as the Act says, for the purpose of facilitating the administration of the trust. I should be inclined myself to say that the meaning of that is, that wherever a trustee might previously make a lease at all, he may now make a twenty-one years' lease or a thirty-one years' lease, and that it was not intended to say either that a trustee should have power to make leases, which he had not before, or that, if he had the power before to make leases, he should exercise it in such a way and to such an effect as to change the beneficial enjoyment of the property. Now that is what the argument really comes round to, because this Act was passed and existed before the trust deed was executed, we are to read it into the trust deed and to say that that trust deed, which would have given Lady Campbell no interest in the unopened minerals without the Act, shall, in consequence of the introduction of these terms of the Act be read as shewing the intention and producing the result that she should have an interest in those unopened minerals. I cannot myself follow that reasoning at all. I do not think that it is just. I do not enter into the question which seems to have been glanced at (apparently Lord Shand and the Lord President are not quite at one about it) as to whether the Act would give the trustee a power to grant a lease of an unopened mine or not. I do not think that it has much bearing upon the present case, and I do not mean to enter into that question; but I do think that the Trusts Act of 1867 never was intended to produce any such effect as to change the nature of the beneficial enjoyment of the property which is conveyed by the trust deed.

There only remains one thing, and that was mentioned the very last of all. De facto here after the death of the truster the trustees opened these minerals and made a lease of them, and it was argued, I think, as well as I could follow it, that because that lease was de facto made, therefore those who made it (I do not think that these were the words used, but this appears to be pretty much the idea) are conclusively precluded or estopped from denying that the testator had intended it to be made. I do not see that they are at all. It seems to me the most reasonable thing in the world that a man who, being of full age, will, if he

lives long enough, be the fiar ultimately (all his rights in the meantime being contingent), when he finds that it would be more advantageous to work the minerals now than it would be to work them afterwards, should say, and should join with the trustees in allowing them to say, "We will make a lease for thirty-one years under which the minerals shall be worked, and the produce which is thus obtained" (it is what they have actually said) "we will not treat as spending-money which Sir Archibald may spend now, but we will treat it as an accumulating fund, of which the interest will go to Lady Campbell." Probably he would be quite right in allowing that. I do not say how that would be.

The result is, that it seems to me that the decision of the Court below is perfectly right. I now move that the interlocutor appealed against be affirmed, and the appeal be dismissed with costs.

LORD WATSON:—

In this case Mr. Davey and Mr. Murray have adduced every possible argument that could have been addressed to your Lordships on behalf of the appellant; but, notwithstanding, they have not satisfied your Lordships that the interlocutor against which this appeal has been taken is erroneous.

There can be no doubt that minerals, so long as they remain embedded in the soil, are to all intents and purposes partes soli, and that even when removed from the strata in which they repose and brought to the surface for the purpose of being sold, they are not, in any proper sense, fruits. I think that that is the doctrine of the Scotch Law as enunciated by our early institutional writers, and authoritatively repeated in recent cases by distinguished members of your Lordships' House. Earl Cairns, in the case of *Gowan* v. *Christie* (1), said, speaking of mineral leases, "There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out-and-out of a portion of land. It is liberty given to a particular

(1) Law Rep. 2 H. L., Sc. 273.

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individual for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away just as if he had bought so much of the soil."

Now had that view been strictly adhered to in the administration of the law, the result would have been that no person having a mere usufructuary right and interest in the soil would have been entitled to the minerals below it as a part of that right or interest. But there has been introduced into the law this qualition, that if the owner of the soil, the fiar, creates a mineral estate by working or letting a particular seam of minerals he thereby brings the proceeds of the minerals so worked or let within the category of fruits, and within the right of usufruct. That applies where merely the right of liferent is given—a right which does not require to be conferred in any artificial terms. In the present case the right is given by a trust deed. It is not given directly to the appellant, the usufructuary; it is given to her through a body of trustees. The direction given to the trustees in the deed is to permit her to enjoy that which, had it been given to her directly, would admittedly not have included a right to the fruits of the mineral lease which is in question in this case. And therefore I think it is incumbent upon the appellant to shew that within the four corners of the trust deed there are some powers conferred upon the trustees, or powers incidental to their office, which enable them to enlarge the appellant's right by giving to her that which otherwise would not be included in it, and to detract to the same extent from the right of the fiar, to whom primâ facie they are directed to give the fee of the estate, including the minerals in question.

Had this deed contained an express or implied provision by the late Sir George Campbell that these minerals should be or might be worked by the trustees in the course of their administration, I should have been prepared to hold that it was his intention that when they were so worked his widow was to enjoy the rents or lordships arising from their working, as part of her usufructuary right. But I am quite unable to find any such direction either express or implied. Still further, dealing with this deed apart altogether from the terms of the statute of 1867, I have heard no argument at the bar to shew that irrespective of the

enactments of that particular statute these trustees had in themselves any administrative power arising from or incidental to the office of trustee which could enable them to grant such a lease. In Scotland the powers of trustees to grant leases have not been very strictly defined; but the limit which has always been placed upon these powers may be described thus—they have been permitted to use all those administrative powers and faculties which are necessary to the extrication and fulfilment of the purposes of the trust deed, but not to use administrative rights and powers which instead of giving effect to and carrying out the purposes of the truster would tend to defeat those purposes as appearing from the deed itself. And if I am right in my construction of the rights and powers contained in this deed, the granting of a lease of these minerals to the effect of bringing the fruits of them, the mineral rents, within the liferent or usufruct of the widow, would be at variance with the direction plainly given in the deed as the law construes it, namely to give the widow the fruits, during her lifetime, of those portions of the mineral field which were let by the truster during his lifetime, and to hand over at her death or re-marriage the whole remainder of the mineral field intact to the fiar. Any such assumed power of administration would be a usurped power, a power in excess of the trustees' rights, plainly in excess of them because instead of promoting it would defeat one of the leading purposes of the deed. Such, therefore, being the terms of the deed itself, such being the rights and powers of the trustees, either derived directly from the deed or incidentally conferred upon them by law for the purpose of working out the deed, it cannot be assumed (apart from the statute, upon which I have yet said nothing) that anything done in violation of those rights and powers, or in excess of those rights and powers, is an act within the contemplation of the truster. The truster cannot be held to have contemplated workings under a lease granted in excess of or contrary to the plain import of his own deed.

But we have here a lease granted with the assent of the presumptive fiar: and no exception is taken by the parties having interest to the substance of that lease; they agree that working shall take place under it and that the tenant shall have his

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right. It is not limited to the period for which alone the trustees at common law could have granted a lease, namely, terminable upon the death or second marriage of Lady Campbell; it is a lease given for a longer period, for a period such as is contemplated by the 3rd sub-section of the 2nd section of the Trusts Act of 1867. But does it follow that because a lease has de facto been granted which was not in the contemplation of the truster or within the ordinary administrative powers of the trustees under his deed, therefore these rents are to go to the liferentrix as if the minerals had been let under the sanction, express or implied, of the truster himself? I apprehend that there is no reason or principle why such a result should follow. Still less can it be considered that such a result should follow when we take into account what I think we must consider to have been the real cause of granting that lease. Although the trustees in the course of their ordinary administration would not have power, under a deed like this, to let the coal or minerals which are destined to the fiar upon the determination of the ordinary usufructuary right, circumstances may emerge which, in the interest of the fiar, may render it in the highest degree expedient at once to convert his coal or ironstone into money, and to give him the money instead of giving him the coal or ironstone. But the exercise of a power which may possibly be implied, but which must be exercised for the benefit and with the consent of the fiar, cannot have the effect of making it a lease for a totally different purpose, namely, a lease for the purpose of enlarging the estate of the truster's widow, instead of a lease for the purpose of giving to the fiar in another form the estate which the truster intended that he should take, and said that he should have. My Lords, I can see no reason whatever for coming to such a conclusion. I can see no reason whatever for holding that the granting of this lease, even with the concurrence of the fiar, is to produce such a result; and I see no reason to doubt that if these trustees had endeavoured to convert this mineral field into a fruit-bearing mineral estate for the benefit of the widow, the fiar would have been entitled to interfere by interdict and to stop any such proceeding.

But then it is said that the Trusts Act introduced an entirely

new rule; and if the provisions of the Act are to the effect described by the learned counsel at the bar they may very properly be said to be novel provisions. That Act was passed in 1867. Its provisions were made applicable not only to future trust deeds, and to trusts which might come into operation under deeds then existing, but also to every trust which had come into operation, however long it had subsisted before the passing of the Act. There is to my mind a very strong à priori probability against the Legislature having intended to give to trustees, who had not previously the power, a right to work the estate of the fiar for the purpose of handing over the proceeds to the life-renter; and I am unable to find in the terms of this Act any warrant for saying that it gives to trustees acting under any deed, of whatever date, a general and unqualified power to work and let minerals. In construing an Act like this, which was passed professedly not for the purpose of disturbing the interests of persons taking beneficial interests under trust deeds, but for the purpose merely of facilitating administration without disturbance to those interests, I think your Lordships must look to the nature of the evils or of the mischiefs which beset administration and made it difficult before.

It was conceded at the bar that until the passing of the Act of 1867 trustees, who had had from the truster power to work minerals themselves or a power to let minerals, could only do so at a great disadvantage, because they could not give an effectual lease for a time beyond the period of their own administration; and therefore it became necessary to enable them, as prudent managers, to have the option of letting minerals, as well as lands, for the customary period, although that period should outlive the termination of their trust: to grant leases binding upon the fiar who took when the trust came to its close. I do not think that the statute does anything more; and the power, such as it is, is only to be exercised in terms of the qualification expressed in the first part of the section. These acts which are sanctioned in the sub-sections are only authorized so far as they "are not at variance with the terms or purposes of the trust." From what I have said before, I think it will be apparent that according to my view a lease made under this trust for the purpose of handing

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over the fiar's estate to the liferentrix would be at variance with the purposes of the trust; and I think that to grant a lease of minerals for thirty-one years under a trust deed which neither expressly nor by implication sanctions the working by the trustees of a single ton of mineral, or the letting it to a tenant for a single day for such a purpose, would be emphatically the granting of a lease for thirty-one years "at variance with the terms or purposes of the trust." If it was plainly the purpose and intent of the trust that the minerals should not be worked or let for behoof of the widow, I do not think that it was the purpose of this Act to give any right whatever to work or let them. It supplies most usefully a lacuna in the administrative powers of trustees, because it enables trustees, who also have the truster's authority to let minerals, to let them upon the same favourable terms as those upon which they are let by other mineral proprietors.

I entirely concur in the motion which my noble and learned friend now on the woolsack has proposed to the House.

LORD BRAMWELL :—

I concur in the advice which has been given to the House on the grounds stated by my noble and learned friend, who has last addressed your Lordships (Lord Watson). I cannot think that it could have been the intention of the legislature to give, or that it can in any way have given, any right to these trustees, or that the truster could have intended to make an arrangement, by which possibly the entire benefit of these minerals should be transferred to this lady, because she might live so long (I do not know what her age is) that her life might continue during the whole course of the lease, and during that time the whole of the minerals might be worked out. It seems to me to be impossible to say that, looking at it as a question of intention to be found in the trust deed, the truster could have intended that. It is impossible to say that he has expressed such an intention, or that he has used words which shew or indicate such an intention.

As to the lease itself, if it is invalid, I cannot see that it gives the appellant any right. If it is valid, it must be so, either with or without her consent. If she has given her consent, we must look at the terms on which that consent has been given. I know

that there is no such consent mentioned in the deed before us, but I am putting it as a dilemma—either she has consented, or she has not. If she has consented, we must see the terms on which she has consented. If she has not consented and if her consent was necessary, she must take such remedy as she would be entitled to.

LORD FITZGERALD:—

The very able and exhaustive opinions which have been delivered by the noble and learned Lord on the woolsack (Lord Blackburn), and by my noble and learned friend opposite (Lord Watson), render it almost inexcusable on my part to add anything; nor would I do so if this was a question of Scotch law; but it is not a question of Scotch law—it stands upon grounds which affect the whole United Kingdom, with the exception of a point on the Trusts Act, to which I shall presently advert.

I listened very attentively to the argument of Mr. Graham Murray yesterday, who I think opened everything that has been brought before us to day, and I listened to that argument with an inclination (if a judge should ever have an inclination one way or the other) to come to a conclusion in favour of the appellant if I could do so according to law. If I had been allowed to conjecture, and had put the question to the truster, whether or not he had intended that his widow should have the annual produce in the shape of the rents of unopened mines, possibly he would have answered in the affirmative, as by the trust deed he was giving to her the benefit of, or the rents derivable from, those mines which had already been opened. But in a case of this kind of course there is no opening for conjecture or guess; we must determine the case according to the settled rules of law.

I do not propose to consider any of the technicalities or limitations or difficulties which may beset a liferenter in Scotland, such as a widow seeking her terce, but I will deal with the case as if of a settlement in England or a trust deed in Scotland. I think that the laws of both countries are in this respect substantially the same; that is to say a tenant for life in England, and a liferenter, as he is called in Scotland, namely, the person to benefit under the trust deed, stand in the same position; each

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is entitled to the whole produce and profits derivable from that life estate whatever they are; but in both countries equally he is subject to this limitation, that in England, he must not destroy the corpus of the estate, or, as it is more correctly expressed in Scotland, the substance of the estate is to be preserved and not destroyed; and in both countries it is subject to this also, that the settlor may in either case expressly indicate a contrary intention—he might have said in this case that his widow should, if she had the rents derivable from opened mines, equally have the rents derivable from mines which were unopened. That is the law of both countries, but that intention must either be expressly shewn upon the face of the settlement or trust deed, or it must arise by fair and reasonable implication. Now I have looked at this trust deed and have read it over several times to see if there was upon the face of it anything that would express or indicate any such intention on the part of the truster, and I can find nothing but the words which have been relied upon by Mr. Davey to day, namely, that in the fifth place the widow is to have "the whole annual produce and rents of the residue and remainder of my means and estate heritable and moveable during all the days and years of her life." The words are not "produce and rents," but "annual produce and rents" of the estate. "Annual produce" means something arising and renewing itself de anno in annum, and is subject equally to the same limitation. If you were to put upon it the construction contended for by the appellant, then under the term "annual produce" you might take away in a few years the whole corpus of the estate. I can find, therefore, in the trust deed no indication of an intention to carry it outside the settled rule of law in both countries, namely, that the corpus or substance of the estate is to be preserved, while subject to that the tenant for life or the liferenter is to have all the annual produce from it.

The only question which remains is on the Trusts Act. At first I was a little puzzled and induced to feel a doubt by the statement of Lord Shand that he does "not entertain any doubt that a power to lease minerals never before worked is included" in the Trusts Act. But that Trusts Act is not to alter existing rights, but to facilitate the administration of trusts; and, if the

testator had indicated any intention, or given any authority to his trustees by the deed of trust, to open mines, then the Trusts Act would have enabled them to make leases for thirty-one years; or rather, if they had power to open mines, then it gave them power to make a lease for a certain period, viz., thirty-one years, instead of a lease for an uncertain period, namely, a tenancy for life. It was with that view that I asked Mr. Graham Murray if he could point out in the trust deed anything which enabled the trustees to deal with unopened mines; because if he could have established that point it would have advanced him a step towards establishing his proposition; but he could not point out a word of the kind in the trust deed; and I apprehend that giving to the Trusts Act the construction and effect which Mr. Davey contended for would be taking a very wide line indeed. We must put a reasonable and proper construction upon it, and that falls very far short of what has been contended for here.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 6th July, 1883.

Agents for appellant: *Grahames, Currey, & Spens.*
Agents for respondents: *W. Robertson & Co.*

[HOUSE OF LORDS.]

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THE TRUSTEES OF THE CLYDE NAVIGATION . . . . . } Appellants;

LAIRD & SONS . . . . . Respondents.

Harbour—Dues leviable—Timber floated in Chains—Usage and contemporanea expositio—The Clyde Navigation Consolidation Act, 1858 (21 & 22 *Vict. c.* 149), *ss.* 98, 99, *Sched. H.*

Where a statute gave trustees appointed for the improvement of a navigable river and harbour power to charge dues on all timber "shipped or unshipped within the harbour or river":—

Held, that, to attach a tow-rope to a log of timber or a number of logs loosely connected at one of the ends for the purpose of towing them, is not to "ship" those logs, and that to cast off the tow-rope is not to "unship" them.

Query, whether a raft of logs so constructed as to be capable of being navigated can be said to be "unshipped" when on reaching its destination it is taken to pieces and landed.

By an Act dated 1770, the Clyde trustees had power to charge rates on "all timber or wood either carried in boats or other vessels, or floated in and upon the said River Clyde within those points aforesaid" (that is above Dumbuck). By a statute in 1840 the Clyde trustees' jurisdiction was extended down the river to Newark Castle, and the duties were imposed by that Act on "all goods carried or conveyed on the river." By the statute in force at present, dated 1858, all the prior Acts are totally repealed. By sect. 75 the limits of the river is to include the whole channel or waterway forming the harbour, and the whole works within certain given limits, and the whole lands acquired for the purposes of such works, or occupied by the trustees in connection with the navigation of the said river. By sect. 98 it is enacted that the trustees are to have power to levy on goods "shipped or unshipped" in the river or harbour the rates specified in the first and second columns of part 1 of Schedule H. Schedule H. is headed "Rates on goods conveyed upon or shipped or unshipped in the river or harbour." In 1876 the trustees under their Act of 1858 sought to levy rates on timber in logs, which were taken out of the vessels importing them from abroad outside the jurisdiction of the trustees, and then floated or towed chained together over the old, shallow channel of the river, to storing ponds situate within the trustees' jurisdiction. In a note for suspension and interdict at the instance of the owners:—

Held, affirming the decision of the Court below, that the word "river" as it occurs in sect. 98 comprehended the whole waters of the Clyde, within

the limits defined in sect. 75, and cannot be restricted to those portions of the channel which have been artificially deepened; but that the statute of 1858 confers no authority on the trustees to levy rates on timber towed in the manner mentioned.

See LORDS BLACKBURN (p. 670) and WATSON (p. 673) as to the value of contemporanea expositio of an Act so late as 1858.

APPEAL from the First Division of the Court of Session, Scotland.

John Laird & Sons, the respondents, are timber measurers at Port Glasgow. The trustees of the Clyde Navigation are the appellants. The question raised is, whether the appellants are entitled, under the Clyde Navigation Consolidation Act, 1858, to levy from the respondents river dues upon timber imported into this country from abroad, unshipped at the harbours of Greenock and Port Glasgow, and thereafter towed or floated, in logs chained together, to certain timber ponds, where it is temporarily stored until it is delivered to purchasers.

These ponds are situate a short distance above Port Glasgow, admittedly within the boundary of the appellants' jurisdiction. The statute in question having recited that it was necessary and expedient that "the rates on vessels and goods should be increased and adjusted," enacted, sect. 3, that all prior Acts relating to the Clyde navigation "shall be and are hereby repealed." Sect. 75 provided as follows:—

The limits of the River Clyde shall include the whole channel or waterway of the said river forming the harbour, and as far down the said river as to a straight line drawn from the eastern end of Newark Castle on the south shore of the said river to the mouth of Cardross Burn on the north shore of the said river, and the whole works within the said limits, for the improvement of the navigation of the river, constructed or authorized to be constructed by or under the charge of the Clyde trustees or the trustees appointed by this Act, and the whole lands acquired for the purposes of such works, or occupied by the trustees in connection with the navigation of the said river.

Sect. 98 enacted:—

Subject to the provisions of this Act, it shall be lawful for the trustees to levy on and in respect of all goods shipped or unshipped in the river or harbour the rates specified in the first and second columns of Part I. of the Schedule (H.) to this Act annexed, and on all animals and carriages shipped or unshipped in the river or harbour the rates specified in Part II. of the said Schedule (H.),

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and all such rates shall be paid by the owner of such goods, animals, and carriages.

And Schedule H. was, inter alia, in these terms:—

I.—RATES ON GOODS CONVEYED UPON OR SHIPPED OR UNSHIPPED IN THE RIVER OR AT THE HARBOUR, OR USING ANY TRANSIT SHED OR WAREHOUSE.

Description of Goods.	Rate per Ton Foreign.	Rate per Ton Coastwise.	Per Ton per Day on Goods in Transit Sheds.	Per Ton per Week on Goods in Warehouses.
	s. d.	*s. d.*	*s. d.*	*s. d.*
* * * *				
Timber—Teak, Oak, Elm, Ash, Birch, or other similar hard wood, per ton of Forty cubic feet	1 3	1 3	1 0	0 2
Timber—Fir or Pine Deals, Battens, or Scantling, per ton of Fifty cubic feet .	1 3	1 3	1 0	0 2
* * * *				
All other goods not particularly enumerated .	2 0	1 6	1 6	0 6

Goods in vessels to or from any place out of the United Kingdom of Great Britain and Ireland shall be liable for the rates in the first column, and goods in vessels to or from any place within the United Kingdom of Great Britain and Ireland, shall be liable for the rates in the second column.

Goods brought to Glasgow for transshipment shall pay only the rate one way, either inwards or outwards, in the option of the trustees, previous notice being given at the tonnage office before the goods are discharged or loaded.

II.—RATES ON ANIMALS AND CARRIAGES SHIPPED OR UNSHIPPED IN THE RIVER OR AT THE HARBOUR.

	s. d.
Horses	1 0 each.
Bullocks, Cows, Mules, Ponies, or Asses . . &c. &c.	0 6 „

Sect. 99 was as follows:—

For the more equitable payment of the rates hereinbefore granted, leviable below the Stockwell Bridge, formerly called the old Glasgow Bridge, that part of the river shall be divided into three stages: videlicet, the first stage

comprehending that part of the river lying above the old ferry of Renfrew, being about six hundred and sixty yards to the east of the present ferry; the second stage extending from the said old ferry of Renfrew to the mouth of Dalmuir Burn; and the third stage extending from the mouth of the said Dalmuir Burn to the Castle of Newark; and all vessels and goods, animals and carriages whatsoever, passing in or upon the river or any part thereof within the limits aforesaid, shall pay the said rates in manner and in the proportions following, and at such stations on the river as the trustees shall appoint; that is to say, in passing upon or going down the river on any part of the first stage as aforesaid, two third parts of the aforesaid rates; on any part of the second stage as aforesaid, one sixth part of the aforesaid rates; and on any part of the third stage as aforesaid, one sixth part of the aforesaid rates, and shall pay the same proportion of the rates aforesaid on passing upon or coming up the river: Provided, that the trustees shall be entitled to levy the whole amount of the said rates on all vessels, goods, animals, and carriages passing or being conveyed along or into the said three stages, or any parts thereof.

It was an admitted fact that the trustees had not, at least since 1858, levied dues on timber floated in the manner described; but in 1876 they intimated to the respondents that in future they intended to claim rates for timber so floated up to and stored in timber ponds. The respondents thereupon raised this action seeking to interdict the appellants from "levying or exacting payment from the complainers of rates or dues for or in respect of timber imported into this country from abroad and unshipped in the harbours of Greenock and Port Glasgow, or either of them, and thereafter floated up to the timber ponds of the complainers, situate above Newark Castle, on the south side of the River Clyde."

For the information of the Court the parties concurred, inter alia, in the following statement of facts:—

3. The chief portion of timber, in logs, is imported into Greenock and Port Glasgow. Such timber comes from the American ports, and from the East and West Indies. It is dealt with as follows:—4. The log timber discharged at Greenock and Port Glasgow is usually first taken to the timber ponds in "chains." A "chain" of timber consists of one row or tier of logs, about twenty to twenty-five in number, temporarily fastened together. When the "chains of timber" reach the ponds the chains are removed, and the logs put singly into the ponds, where they float when the tide is not out. 5. A "chain of timber" and a "float of timber" are synonymous. A "raft" of timber consists of two, three, or four tiers of logs deep. 6. Some of the timber ponds are between Greenock and Port Glasgow, and others are above Port Glasgow. 7. The log timber is usually sold while in the ponds; and when it is to be delivered at Glasgow, or at the building-yards on the river, it is made up into rafts of two

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three, or four tiers deep, securely bound. These rafts are made up at the ponds. 8. No dues have hitherto been levied on the "chains" or "floats" of timber going to the ponds. 9. Of timber formed into rafts in ponds at and below Port Glasgow and Greenock, and towed to Glasgow, the quantity in tons, of fifty cubic feet of soft and forty cubic feet of hard timber to the ton, for year ended the 31st of December, 1877, was . . 17,244 @ 1/3 {per ton as per Schedule H} £1077 15 0

10. Of timber formed into rafts in ponds above Port Glasgow, and towed to Glasgow or other places on the river, the quantity in tons, measured as above, was, during said year . . 23,564 @ 1/3 1472 15 0

Total . . 40,808 £2550 10 0

11. The timber sent to the ponds is discharged out of the ships either at Greenock or Port Glasgow. No ship comes up to the ponds above Port Glasgow to discharge there. The timber arriving at the ponds is hauled up thither in chains, generally in tow of tug steamers, but there is also a considerable quantity floated up by the tide. Dues have not hitherto been charged in respect of timber stored in the ponds in question until floated up to Glasgow or any of the building-yards on the river, when it is charged according to its destination; that is, if taken to Dumbarton it is charged for the lowest or third stage only, if to Renfrew it is charged for the third and second stages, and if taken above that it is charged for all the three stages. 13. The tugs towing the timber from below the boundary of the trustees' jurisdiction, to the ponds in question, do not pay, and have not hitherto been charged, dues.

The respondents contended that the timber floated to their ponds in the manner explained is not taxable under the trustees' Act of 1858, because it could not be said of it that from the time of its leaving the harbours of Greenock and Port Glasgow to the time of its reaching the timber ponds it is either "shipped" or "unshipped;" and secondly, in floating the timber from one place to the other, "the river" as defined in sect. 75, is not used at all, for the timber is dragged over the shallow part of the channel and does not pass over or use any part of the river on which the trustees have expended labour or money. And again, the taxing powers conferred by the statute of 1858 were interpreted by those who administered the Act in a manner adverse to the view now contended for by the appellants, because although the respondents have been in the constant practice of floating logs of timber to their ponds since 1858, no suggestion was ever made until 1876 that the timber so floated was chargeable with dues under the Act. The appellants maintained they had a right, under

the Clyde Navigation Consolidation Act, 1858, and the statutes therewith incorporated, to levy dues on the timber in question.

On the 17th of January, 1877, the Lord Ordinary granted an interim interdict in the terms prayed for.

On the 18th of July, the Lord Ordinary having heard counsel, refused the note for suspension and interdict. The respondents reclaimed, and in conformity with the views of the majority of the Judges of the whole of the First Division and three of the Second Division, the First Division pronounced an interlocutor recalling the Lord Ordinary's interlocutor and sustaining the reasons for suspension and interdict. The appellants appealed to this House. When the case came on for hearing it was stated to the House that they had lately discovered an erroneous statement of fact in their answers to the respondents' articles 5 to 9 in their statement of facts. In these answers they had stated in reference to the Acts of Parliament of the Clyde Trustees prior to the Act of 1858, that "timber was, however, exempt from river dues, and was made liable for the first time by the Act of 1858:" whereas rates were imposed by the prior statutes upon all goods, and had been regularly levied on timber both before and after the Act of 1858. The respondents consenting on payment of all costs, the Lords delivered a judgment remitting the case to the Court of Session with leave to the appellants to lodge an amended statement with regard to this particular averment and the case to be reheard. In accordance with this judgment the appellants lodged in the Court of Session a minute of amendment. In this they stated that instead of the answer to articles 5 to 9 of the complainers' statement of facts they proposed to substitute inter alia, the following:—

Explained that by sect. 3 of the Act of 1858 certain prior Acts were repealed, subject to the provisions of the said Act. These prior Acts were eight in number, namely—32 Geo. 2, c. 62 (1758); 10 Geo. 3, c. 104 (1770); 49 Geo. 3, c. 74 (1809); 6 Geo. 4, c. 117 (1825); 3 & 4 Vict. c. 118 (1840); 9 Vict. c. 23 (1846); 17 Vict. c. 62 (1854); and 20 & 21 Vict. c. 92 (1857).

By the Act of 1758, sect. 16, it was provided, "And be it further enacted by the authority aforesaid, that in consideration of the great charges aforesaid, it shall and may be lawful to and for the said magistrates and council, and their successors and their assigns, and such who shall be appointed by them, and no others, from time to time and at all times hereafter, to ask, demand, receive, and recover, from all and every person or persons who shall carry and convey, or

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cause to be carried or conveyed, any goods, wares, merchandises, commodities, or other things whatsoever (except coals), by or through the lock or locks, dam or dams, or any other work or works to be made and erected at the place called Merlin Ford aforesaid,—such rates and duties for the same as the said magistrates, &c., for the time being shall think fit, not exceeding one shilling sterling for every ton weight of such goods, wares, merchandises, commodities, or other things which shall be carried and conveyed by or through the lock or locks, dam or dams, to be built, made, and erected in, over, or on the said river or lands adjoining thereto (except as aforesaid) . . ."

By the Act of 1770, sect. 18, it was provided, "And be it enacted by the authority aforesaid, that for the more equitable payment of the rates and duties granted by the before recited Act (the Act of 1758), and confirmed by this present Act, the said River Clyde shall be divided into three stages at the particular places hereinafter mentioned, videlicet, the first shall be and is hereby fixed at that part of the said river Clyde where the ferry-boat of Renfrew now crosses the said river from the quay at Blawerthill on the north side of the said river to the present quay on the south side of the said river, opposite the said Blawerthill quay; the second of the said stages at or above the east side of the new intended cut or canal from the river Forth to the river Clyde, at or near Dalmuir Burn foot; and the third stage shall be and is hereby fixed at any place of the banks of the said river Clyde, betwixt the west side of Dalmuir Burn and below the intended cut or canal and Dumbuck Ford aforesaid; and that all ships, barges, vessels, lighters, boats, goods, merchandises, commodities, and things whatsoever, passing in or upon the said river Clyde, from the quay or quays of Glasgow aforesaid down the said river, shall pay the rates and duties granted by the before recited Act (the Act of 1758), and confirmed by this present Act, in manner and in the proportions following, &c."

Sect. 22 further provides, "And for the better ascertaining the tonnage of timber and wood to be charged with the rates and duties granted by the said recited Act (the Act of 1758) and confirmed by this present Act, be it further enacted and declared that fifty feet of round or forty feet of square oak, ash, or elm timber, or fifty feet of fir or deal balk, poplar, or other wood, shall be deemed, reckoned, and estimated, as and for one ton weight, and all timber or wood either carried in boats or other vessels, or floated in and upon the said river Clyde, within the bounds aforesaid, shall be charged and pay accordingly."

The powers thus conferred were not affected by the later statutes, and the respondents (appellants here) and their predecessors have been in regular use, under the powers thus conferred, to levy dues on all timber brought into the river Clyde within their jurisdiction, with the exception of what is brought into the ponds situated in the third stage of the river, and removed therefrom without going to Dumbarton in the third stage, or on to the first or second stages; which has until recent years been small in amount.

To this the respondents lodged answers.

On the 10th of March, 1882, the whole case came again before the First Division, and their Lordships pronounced a judgment of new recalling the Lord Ordinary's interlocutor of the 18th of

July, 1877, and suspended the proceedings complained of, and declared the interdict granted on the 17th of January 1877, perpetual (1).

On the 16th of June, 1882, their Lordships pronounced an interlocutor decreeing against the now appellants for the taxed amount of the now respondents' expenses.

On appeal,

July 4, 5. *The Lord Advocate* (*Balfour*, Q.C.), and *The Solicitor-General for Scotland* (*Asher*, Q.C.), were heard for the appellants. Their arguments sufficiently appear from the Law Peers' opinions.

Sir *F. Herschell*, S.G., and *Trayner* (of the Scotch Bar), were heard for the respondents. They cited *Pryce* v. *Monmouth Canal, &c., Co.* (2).

Having taken time to consider, the House delivered judgment as follows:—

LORD BLACKBURN:—

The appellants have no right to exact any dues except in so far as it is conferred upon them by statute. And as their Act of 1858, after a recital in the preamble that it was necessary and expedient that "the rates on vessels and goods should be increased and adjusted," by sect. 3 enacted "that the recited Acts" (that is, all prior Acts relating to the Clyde navigation) "shall be and are hereby repealed," it was necessary for the appellants to establish that on the just construction of that Act of 1858 they had power to levy and exact payment of rates and dues on timber treated as described above. The question depends on what is the true construction of the Act of 1858, which I shall comment on afterwards. But there is a preliminary question which I will first dispose of.

No rates or dues are imposed except on vessels or things "in the river or harbour," and the respondents contend that the timber in question, which is not said to have been within the

(1) 9 Court Sess. Cas. 4th Series, 711. (2) 4 App. Cas. at pp. 212, 215.

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harbour, never was, within the meaning of the Act, in the river. Of course if this were so, there would be an end of the case. The definition of the limits of the river is given by sect. 75, which is as follows [The section is set out ante, p. 659]:—

It is not disputed that the timber ponds in question are east of or above the straight line drawn from the eastern end of Newark Castle to the mouth of the Cardross Burn, nor that the timber is floated up what was formerly the main channel of the Clyde there. But the Clyde trustees have cut through a sand bank on the northern side of that old channel there, and made a deeper channel. The floating timber does not go along that deeper channel, nor, indeed, pass over or use any part of the river on which the trustees have expended labour or money. And it was pleaded below that the definition of "river" was such as to exclude the parts of the River Clyde which, though above Newark Castle, were not occupied by any works. No one of the judges below gave any countenance to this contention. And though the Solicitor-General for England said for the respondents what could be said in its favour, your Lordships did not think it necessary to hear the Lord Advocate and the Solicitor-General for Scotland in reply to him. I think it clear that sect. 75 is extensive, not restrictive, of the word "river." It includes the river, *and also* the works and the lands occupied, but does not exclude such portions of the river as are not occupied by works.

There was, at the beginning of the argument, a suggestion made that there might be cases in which a vessel lying to the west of the line might discharge her cargo, or part of it, by means of boats on the east of the line, in which case it might be said that the goods were unshipped both within and without the river, but Mr. Trayner pointed out that the terms of the note for the interdict exclude any such case.

On the question of the construction of the Act of 1858 there has been much difference of opinion below. Lord Adam, as Lord Ordinary, decided it in favour of the now appellants. The first Division of the Court of Session called in three consulted judges. A majority of the seven judges, consisting of the Lord Justice Clerk, Lord Ormidale, Lord Mure, and the Lord President,

recalled Lord Adam's interlocutor, and made the interdict perpetual, Lord Gifford and Lord Shand dissenting, and Lord Deas going on a special ground. An appeal was brought to this House, but the appellants obtained leave to amend their statements. Proof was taken on the amended statements, and then the First Division made the interlocutor appealed against, Lord Shand still dissenting, and Lord Deas on this occasion joining the majority, so that the judges, eight in number (including Lord Adam), are divided five to three.

In addition to the judgments, some of them very elaborate, your Lordships have heard very able arguments from counsel, who had the advantage of being able to study these judgments. I think I may fairly assume that you have before you all the assistance which learning and ingenuity can supply towards the solution of the question.

I shall not attempt to go through the arguments on each side. I have come to a different conclusion from Lords Shand and Gifford, and I have therefore examined carefully what they say, and I shall point out where and why I differ from them, and where I am not sure that I agree with the Lord President. I shall examine what he says, and state where I doubt if I agree with him, but I shall not waste time by repeating in other words what I agree with in the judgments of the majority.

Under the repealed Acts the trustees had greatly deepened and improved the Clyde, especially in the upper part of it. And in express terms in the Act of 1770, which, however, only extended down to Dumbuck, it was enacted, by the 22nd section, that "all timber or wood, either carried in boats or other vessels or floated in and upon the said River Clyde within those points aforesaid" (that is, above Dumbuck) "shall be charged and paid." By the 56th section of the Act of 1840, which extended the jurisdiction of the trustees to Newark Castle, the language is changed, and the duties are imposed on "all goods carried or conveyed on the river." But those enactments are, by the Act of 1858, totally repealed, and the language is again changed to what we find in sect. 98.

Now I agree with Lords Gifford and Shand in seeing no reason why timber floated on the Clyde should not pay for the use of

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the improved navigation at least as much as timber conveyed in vessels. Although I think the shipowners might produce good arguments for saying that goods consigned to a further port, but carried in a vessel which called at Glasgow either to fill up her cargo, or to discharge part of it, should not be charged; and as such goods no doubt are carried and conveyed along the Clyde, that therefore the language of the enactments should be altered so as not to include them (and I think it probable that this was one reason at least why the language was changed as it has been), yet I am not able to see any argument in favour of relieving from charge those who floated timber on the Clyde. And therefore I agree that it would have been a reasonable scheme of taxation to charge timber floated on the Clyde, or at least on the upper parts of the Clyde. The Lord President shews that there are good reasons for saying that it is at least by no means so obviously just to tax timber using but a small part of the river Clyde, and that a part which is, as far as the operations of the trustees are concerned, in a state of nature. I think that if the legislature were framing a scheme of taxation such as is suggested those would be arguments in favour of making an exemption in favour of the ponds of the now respondents. Doubtless they would be met by others.

But though I think the reasonableness of a scheme is a very good reason for thinking that the legislature might have wished to adopt it, and therefore for construing the words used as shewing an intention to carry it out, if the words used will bear such a sense, it affords no justification for introducing new words, or construing the words used in a sense which they cannot bear, and I find no words in this Act of 1858 capable of bearing a meaning which would shew that the legislature intended this reasonable scheme. I equally fail to see words indicating an intention to make this perhaps not unreasonable exemption from the general rate if it were imposed.

Lord Shand asks, if the 98th section of the statute be taken alone, "Is not timber towed in rafts and loaded in the harbour, say of Bowling or of Glasgow, in a reasonable sense of the expression unshipped in the river or harbour?" I cannot agree in his answer. He says, "I think it is no strained construction, or

anything but a fair and reasonable construction of the term to hold it to apply to the detaching of timber from the steamer which has conveyed," (i.e., tugged) "it." It is difficult to reason on such a point, or do more than state how it strikes one's mind. It does not seem to me a construction of the words at all, but a substitution of other words for them. I cannot think that in any sense of the words, to attach a tow-rope to a log or set of logs for the purpose of towing them is to "ship" those logs, or that to cast the tow-rope off is to "unship" them.

There may, however, be other things in the Act which put a construction on the words of sect. 98 different from what they primâ facie bear. It is said, and I think it is the strongest argument produced for the appellants, that Schedule H, which is a part of the Act, is headed thus, "Rates on goods *conveyed upon* or shipped or unshipped in the river or harbour." Now if this, however strangely misplaced, could be construed as an interpretation clause declaring that "shipped or unshipped in" should mean and include "conveyed upon" the river or harbour, it would produce this effect, but it would do more: it would render the change of language from that in the 56th section of the Act of 1840 to that in the 98th section of the Act of 1858 wholly nugatory.

The second note at the foot of the schedule confirms my guess that goods conveyed in transit on the Clyde, where bulk was not broken within the Clyde, which were included in the language of the 56th section of the Act of 1840, were meant to be protected by the change of language.

By this note it is provided that if bulk is broken for the purpose of transshipment the goods should not be deemed to be *both* shipped and unshipped but once only, and that seems to have produced the unlucky introduction of the words "conveyed upon" into the heading of the schedule. Those words are in my view useless; but if to avoid leaving them useless, they are treated as interpretation, they would produce an effect that could not have been intended. I think it better to treat words as idle useless words, than to make them undo the whole effect of the Act. It certainly could not be intended by introducing these words to say that goods conveyed up and down the Clyde in

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transit, without breaking bulk, should be charged for that conveyance both ways.

As to the 99th section, I think it is what it professes to be, an enactment "for the more equitable payment of the rates hereinbefore granted," and though it repeats the language used in the 69th section of the Act of 1840, without making the changes which would have rendered it more in harmony with the changed language of the enacting clause, I do not think it can properly be read as making that change in the enacting clause merely nugatory.

There is only one other point on which I shall say anything. The trustees have ever since the passing of the Act of 1858 down to the commencement of this suit, a period of eighteen years, been in the habit of levying rates and dues on timber floated to yards on the upper part of the Clyde, and the timber merchants, an acute and wealthy body, by no means inclined to pay money gratuitously, or to shrink from litigation, have submitted and paid them. I think that raises a strong primâ facie ground for thinking that there must exist some legal ground on which they could not resist. And I think a Court should be cautious, and not decide unnecessarily that there is no such ground.

If the Lord President means no more than this when he calls it "contemporanea expositio of the statutes which is almost irresistible," I agree with him. I do not think he means that enjoyment, at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the Court so as to prevent it from giving the true construction. If he did I should not agree with him, for I know of no authority, and am not aware of any principle for so saying.

In this case Lords Gifford and Shand both argue thus. They say there is no distinction in principle between the case of timber floated from Greenock in a raft to Glasgow, and there stored in a timber yard, and timber floated in a raft to these ponds. True, that sect. 99 causes the amount of the rate to be six times as great in the one case as in the other; true also, that timber floated to Glasgow is, generally at least, in built rafts, and that to the timber ponds is only in chains, but that makes no difference in principle. This decision, therefore, they said, will unless they

have their Act amended take away from the Clyde trustees a large revenue which they have enjoyed for at least eighteen years.

I am not sure how much weight such a consideration ought to have, but it has had such weight with me that I have looked carefully for some distinction satisfactory to my own mind between the two cases. I have not found any, but I am not prepared to say that none exists. It is with regard to the existence of such a distinction, and to that only, that what I have said as to contemporanea expositio is in my mind relevant.

I think if there is no such distinction, the consequence apprehended will follow from the construction put upon the statute below, and though I am sorry for it, it does not prevent me from saying that such is the true construction. But I do not decide, and I advise your Lordships not to decide, that there is no such distinction. All that it is now necessary to decide is that there is no authority given to the Clyde trustees to levy rates on timber towed in chains to those ponds.

I move that the interlocutors appealed against be affirmed, and the appeal dismissed, with costs.

LORD WATSON :—

The right of the appellants to levy dues is wholly derived from the provisions of their Act of 1858, which repeals all prior statutes relating to the navigation of the Clyde. Two kinds of rate are sanctioned by the Act of 1858, the one upon ships, and the other upon goods. The condition upon which the Appellants are, by sect. 98, authorized to exact the second of these rates, is, that the goods shall be "shipped or unshipped in the river or harbour."

I entertain no doubt that the word "river," as it occurs in sect. 98, must be taken to comprehend the whole waters of the Clyde, within the limits defined by sect. 75, and cannot be restricted to those portions of the channel which have been artificially deepened. If that be conceded, it necessarily follows that the logs which are floated from the harbours of Greenock or Port Glasgow to the respondents' storing ponds pass over part of the

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third stage of the river; and consequently that a sixth part of the scheduled rate for timber is payable in respect of these logs, if, on their arrival at the storing ponds, they are "unshipped" within the meaning of sect. 98.

Taking the provisions of that clause by themselves, I am unable to come to the conclusion that a number of separate logs, loosely connected at one of their ends, and towed along the river, can, in any reasonable sense, be said to be "unshipped" when the tow-rope is cast off and they are drawn up on the beach. Whether a raft of logs, so constructed as to be capable of being navigated, can with propriety be said to be "unshipped," when on reaching its destination, it is taken to pieces and landed, appears to me to be a question which it is not necessary, for the purposes of the present case, to decide; and I therefore express no opinion in regard to it.

But it is argued that the language of sect. 98 must be taken in connection with the terms of schedule H, part 1, therewith incorporated, and also with the provisions of sect. 99. Now the schedule in question is referred to and incorporated with sect. 98, solely for the purpose of fixing the amount of the rates payable in respect of the different classes of goods which, by sect. 98, are made liable to duty. The words which occur in the heading of the schedule are these:—"Rates on goods conveyed upon or shipped or unshipped in the river or at the harbour, &c." I do not think it can be seriously suggested that these words "conveyed upon" were intended to subject to payment of dues goods conveyed upon the river, but neither shipped nor unshipped within the limits of the harbour or river. If that were the case a foreign vessel discharging part of her cargo at Glasgow, and thence proceeding to discharge the remainder at Liverpool, would pay a single rate upon the cargo unloaded in the Clyde, and double rates upon the cargo unloaded at Liverpool, which was neither shipped nor unshipped in the Clyde. That such was not the intention of the legislature is apparent from the terms of a proviso annexed to schedule H, which enacts that cargo transshipped in the river, which is both unshipped and shipped there, shall only pay one rate. Very little weight is in my opinion

attachable, in any case, to the mere title of a schedule, as qualifying the enacting words of a statute; and in the present case it does not appear to me that the words relied upon by the appellants are sufficiently explicit, even if full weight were given to them, to produce that effect.

Then sect. 99 is not a rating clause. It specifies the proportion of the rates leviable by virtue of sect. 98, which can be exacted in each of the three stages into which the river is thereby divided; and it declares that all goods "passing along the river" shall pay according to the proportions thereby fixed. To my mind it is perfectly clear that the provisions of this section were intended solely for the apportionment of the rates already imposed, and not for the imposition of any new rate; and I must therefore assume that by goods "passing along the river" the legislature meant "rateable" goods passing along the river, or, in other words, goods which either had been shipped, or were to be unshipped within the limits of the river or harbour.

I have only to add that, in my opinion, such usage as has in this case been termed "contemporanea expositio," is of no value whatever in construing a British statute of the year 1858. When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken: and in determining the true import of such a statute it appears to me to be quite immaterial to consider whether it was passed in the year 1858 or in 1883.

LORD BRAMWELL:—

I distrust my opinion in this case; for I cannot see two sides to the question, though there certainly are two, as is shewn by the different views taken by the very eminent persons who have considered it.

By sect. 98 "it shall be lawful for the trustees to levy on and

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in respect of all goods shipped or unshipped in the river or harbour the rates specified in the first and second columns of part 1 of the schedule, and on all animals and carriages shipped or unshipped in the river or harbour the rates specified in part 2."

Now if there was nothing in the Act to qualify, explain, extend, or alter this enactment, the only question would be, was the timber mentioned in this case "shipped or unshipped in the river or harbour." But it is said that there is something in the schedule which qualifies, explains, extends, or alters the enactment in sect. 98 and extends it to goods which are neither shipped nor unshipped in the river or harbour. I must say that there ought to be very plain words to have such an effect, as not only would it alter a plain enactment, but it would also make liable to rates goods which had no benefit from the improvements or wharves of the appellants, except indeed that there was less danger to the ship that carried them. Still, if sufficient words are there the case should be decided accordingly. I do not stop to consider whether the rates are in the nature of a tax or not. Even if they are, the statute should be correctly construed, bearing in mind that the appellants, who make the claim, must establish it.

But, in the schedule, I find nothing to make me think or hold that it was intended to extend, and that it does extend, the words "shipped or unshipped" in sect. 98. It is true it has the words "rates on goods *conveyed upon* or shipped or unshipped in the river or at the harbour," but that cannot mean "conveyed upon," though neither shipped nor unshipped. If it did, I cannot see why goods conveyed upon and unshipped should not pay two rates. For the statute would then mean that goods conveyed on the river should pay a rate, and that goods unshipped should pay a rate, and there would be no reason why the same goods should not pay both rates. At all events goods "conveyed upon," though neither shipped nor unshipped, would be liable. This, however, would be wholly unreasonable, and is admittedly contrary to the practice. The draftsman used "or" for "and," as is shewn by his second use of the word "or," when clearly an addition and not an alternative was meant. Again, in the note to the schedule goods are spoken of in a way which shews that

goods on board vessels were meant. Still further, part 2 of the schedule in words applies to animals and carriages only when "shipped or unshipped." No reason can be given why if other goods should pay which are "conveyed" only, these should not. To hold that the words "shipped or unshipped" in sect. 98 are extended by the schedule, would be to hold that they are as to some things and not as to others. For these reasons I think not only that the schedule does not extend sect. 98 in *plain* language, but I really think there is *no* reason for saying that it does. And I believe that the draftsman in sect. 98 used the right words to express the intention he had.

But it was said that assuming that goods to be liable to rates must be shipped or unshipped, this timber was unshipped. Now I agree that almost any construction, however strained, is allowable to prevent something worse. Unless for such reason, I should say it was impossible to hold that this timber was "unshipped" in the river. I must repeat what I have said on a former occasion, namely, that I can give no reason for this except that it was not "unshipped." It is for those who say it was, to make it out. It is for them to shew that detaching a float of timber from a tug and each log from the other is "unshipping." All I can say is that it is not. I cannot help thinking that the opinion that it was, must have been brought about by some feeling that it was just that it should be. I cannot see this. I think it would be unjust to make this timber pay which has no benefit, or but little, from the improved navigation and none from the wharves. I think if parliament had been asked to make this charge it should have refused it. I am of opinion that this appeal should be disallowed.

LORD FITZGERALD:—

The noble and learned Lord on the woolsack has in his judgment stated the terms of the interdict (1) granted in this action of suspension and interdict, and made perpetual by the interlocutor of the 10th of March, 1882, and I desire to confine myself to cases coming within the terms of that interdict, and not to go beyond it.

(1) Given in statement of facts, ante, p. 661.

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I do not intend to express any opinion as to the case so much discussed, of timber built up into rafts outside the limits of the undertaking of the trustees, and then conveyed over the waters of their portion of the river to the Broomielaw or other part of the harbour of Glasgow, its ultimate destination, or as to timber originally shipped and destined for Glasgow, but unshipped outside the western limit of the waters of the trustees, and thence conveyed over those waters to the harbour of Glasgow or a landing place with its limits. The complainers are timber measurers in Port Glasgow and proprietors of certain ponds situated on the south bank of the Clyde, above Newark Castle, between high and low water mark. Timber in logs unshipped in the harbours of Port Glasgow and Greenock is floated up the river to those ponds for storage purposes. The trustees of the Clyde Navigation propose to levy rates on this timber. The question is, are they entitled to do so? That question in the end was reduced to the construction of sect. 98 of the trustees' Act of 1858. I put aside all other questions.

It seems to me to be quite clear and free from any doubt that the trustees are not entitled under sect. 98 to levy rates on goods unless the goods be shipped or unshipped within their waters. "Shipped" means put on something which answers the description of a ship or vessel, no matter what its shape or form may be, for the purpose of being conveyed therein to some destination; and "unshipped" means equally taken out of the ship or other vessel in which the article has been conveyed or carried and delivered to or placed within the dominion of the consignee or owner. The unshipping of the timber logs in question took place in the ordinary course of business either at the Port of Greenock or at Port Glasgow, and was there complete. The complainants were either the owners of the logs at the time of unshipping, or became subsequently owners by purchase. There was no unshipping within the limits of the jurisdiction of the trustees. The state of circumstances then is wanting on which, and on which alone, the authority of the trustees to levy rates arises.

But it was contended that the 98th section should be read as if the heading of schedule H. was incorporated in it, or by the

light of that heading. My Lords, I concur in and adopt the criticism of the noble and learned Lord (Lord Blackburn) on this contention and also his conclusion. We must reject the words "conveyed upon or" altogether; or, if we are to take them into consideration, I cannot construe them as making the change in sect. 98 which the now appellants have so strenuously urged.

I have listened with pleasure to the judgment of the noble and learned Lord opposite (Lord Watson), and to the terse judgment of the noble and learned Lord beside me (Lord Bramwell), in both of which I concur.

Interlocutors appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 19th July, 1883.

Agent for appellants: *W. A. Loch.*

Agents for respondents: *Simson, Wakeford, Goodhart, & Medcalf.*

[HOUSE OF LORDS.]

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PATERSON AND HUSBAND . . . . . APPELLANTS;

POE . . . . . RESPONDENT.

Husband and Wife—Succession to Personalty under Married Women's Property (Scotland) Act, 1881 (44 & 45 *Vict. c.* 21)—*Applicability of Sect.* 6 *to Marriages entered into before the Act.*

The 6th section of the Married Women's Property (Scotland) Act, 1881, enacts, "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

A woman, married before the passing of the above cited Act, succeeded to moveable property, some before and some after the date of the Act, which was settled upon her for her personal use, and free from the jus mariti of her husband. She died, without issue, intestate, and domiciled in Scotland. In a claim by A., her husband, against her executrix :—

Held, affirming the decision of the Court below, that sect. 6 of the Married Women's Property (Scotland) Act, 1881, applies to marriages entered into before the passing of that Act as well as to those contracted after that date; and that, therefore, A. was entitled in accordance with that section to half his wife's personal estate.

Also, that sub-sect. 2 of sect. 3 applies only to the preceding sections.

APPEAL from the First Division of the Court of Session, Scotland.

Robert Wilson Poe, the respondent, was married to his now deceased wife on the 1st of August, 1878. She died on the 13th of January, 1882, without issue, survived by one sister, intestate, and domiciled in Scotland. Mrs. Poe died possessed of some £4000 separate personal estate, held by her exclusive of her husband's jus mariti. Of this property she succeeded to several sums from different sources; to some before the date—18th of July, 1881—of the passing of the Married Women's Property (Scotland) Act, and to some of them after that date. The appellants are Mrs. Poe's only sister and sole next of kin, Mrs.

Paterson and her husband. Mrs. Paterson has administrated her moveable estate as her executrix dative. The action was raised by the respondent, who sought for, inter alia, a declarator that he was entitled to one half of the moveable estate of his deceased wife in terms of sect. 6 of the above-mentioned Act.

The appellants, Mrs. Paterson and her husband, disputed this claim, contending that the terms of the 6th section of the Married Women's Property Act, 1881, are controlled by sect. 3, sub-sect. 2, to the effect of limiting the application of the 6th section to marriages contracted after the passing of the Act.

The preamble of the Married Women's Property (Scotland) Act is in these terms:—"It is just and expedient to protect, to the further extent hereinafter provided for, the property of married women in Scotland." And sect. 3 is as follows: "In the case of marriages which have taken place before the passing of this Act: (1.) The provisions of this Act shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him. (2.) In other cases the provisions of this Act shall not apply except that the jus mariti and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

Sect. 4 is a provision by which it is competent to all persons married before the passing of the Act to make an agreement by which they can bring the wife's whole estate under the regulations of the Act.

Sect. 5 enacts "where a wife is deserted by her husband, or is living apart from him with his consent, a judge . . . on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

And sect. 6 is in these terms:—"After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in

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relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

The Lord Ordinary (1), by an interlocutor dated the 1st of July, 1882, upheld the contention of the now appellants and assoilzied them from the conclusions of the action. The respondent reclaimed; and on the 13th of December, 1882, the First Division of the Court of Session recalled the Lord Ordinary's interlocutor and declared in favour of the declaratory conclusions of the summons (2).

On appeal,

July 13, 16. *The Lord Advocate* (*Balfour*, Q.C.), and *Alexander Ure*, were heard for the appellants.

The Solicitor-General for Scotland (*Asher*, Q.C.), and *J. F. Clerk*, for the respondent, were not called upon.

LORD BLACKBURN:—

I think that, notwithstanding all the ingenious arguments which have been addressed to us, the judgment of the Court below is perfectly right, and that this interlocutor should be affirmed and the appeal dismissed with costs.

The whole case stands upon the construction of a statute, not very carefully or skilfully drawn, but in constructing which, according to the general rules, we must see what is the intention of the legislature as appearing from the words it has used. Now sect. 6 of the Act (44 & 45 Vict. c. 21), to which the main question applies, says: "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law," &c. If that had stood alone and unqualified, words could hardly have been devised which would more clearly express that it depends upon whether the woman is domiciled in Scotland at the time of her death or not. So far as regards the wording of the section it is quite irrespective of whether the marriage took place since the passing of the Act or long before it. That much is perfectly clear.

(1) Lord Fraser. (2) 10 Court Sess. Cas. 4th Series, 356.

But it is contended (and if that were made out it would be a good answer) that although these words in sect. 6 would apply in the case, which is the one that has happened, of a woman dying domiciled in Scotland after the Act, her marriage having taken place before it, yet there are words in a prior section which would have the effect of cutting down and controlling this enactment and making it in fact say that it shall apply only to cases where she shall die after the passing of the Act, having been married after the passing of the Act. To support the argument it is necessary to make out that the Act is cut down to meaning that. It is said that that is effected by the 3rd section. Now the 1st and 2nd sections are in express terms confined to saying that in cases where the marriage is contracted after the passing of this Act certain effects are produced upon property in Scotland; and the reason why these two sections are confined to that purpose is obvious enough, for the 5th sub-section of clause 1 is: "Nothing herein contained shall exclude or abridge the power of settlement by ante-nuptial contract of marriage;" so that it is pretty plain that it was meant to say: "When you are marrying after 1881, that is after this Act has come into force, it is your own fault if you do not by an ante-nuptial contract provide for what is expedient."

But then comes the 3rd section. "In the case of marriages which have taken place before the passing of this Act: (1) The provisions of this Act shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him." That is not the case which has now happened, but it has of course to be taken into account in construing the 2nd sub-section. It goes on to say: "(2) In other cases," that is to say, where the parties are married prior to the Act, and a reasonable provision has not been made by irrevocable deed, "the provisions of this Act shall not apply except that the jus mariti and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

Now the whole argument, as it seems to me, which prevailed

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with the Lord Ordinary, and which has been urged again before us now, is that "the provisions of this Act" primâ facie mean all the provisions of the Act—which is true. If there is nothing whatever to shew that the words are used in any narrower sense, they would mean that no part of the Act shall apply. But that "the provisions of this Act" cannot be used in that sense appears, because it is said, "the provisions of this Act shall not apply *except*;" and when we come to look at the provisions of the Act with the exception, it shews at once that, however stupid and blundering the draftsman was when he used the words, the provisions of the Act of which he was talking were such provisions as include at least those which bring in his exception; and when we find that he says that the provisions of the Act shall not apply except that the jus mariti and the right of administration shall be excluded, it amounts in reality to shewing an intention, which is to be carried into effect, by moulding the words of the Act so as to be a positive enactment that the provisions of the preceding sections (sects. 1 and 2), so far as they exclude the jus mariti and the right of administration, shall apply to all estate, moveable or heritable, to which the wife may acquire right after the passing of the Act, unless there has been by irrevocable deed a reasonable settlement made in favour of the wife, in which case they shall not apply. The whole question comes to be whether or not we are obliged to mould sect. 3 in that way in order to carry out the object and intentions of the legislature. Are we to mould it in that way, giving a sense to "the provisions of this Act" as meaning those previous provisions in sects. 1 and 2, excepting the enactments which are excepted; or are we to interpret it as saying that none of the provisions of this Act shall apply to such a marriage, but that it shall be as if the Act had not passed at all? The latter construction seems to me to be an unreasonable one to put upon the words of the legislature; for it is admitted that the very next provision of the Act cannot be included in the "provisions of this Act" which are not to apply. That is a provision by which it is competent to all persons married before the passing of the Act to make an agreement by which they can bring the wife's whole estate under the regulations of the Act. That could never have been intended to be excluded from

application; but on the face of it it would be so according to the appellants' contention. Now comes the provision of the 5th section, by which, where the wife is deserted by her husband, the Court or sheriff may dispense with his consent to any deed relating to her estate. That could hardly have been intended to be excluded from application. It could hardly matter for that purpose whether the marriage was before the passing of the Act or since.

Then comes the section in question, the words of which say expressly that where a married woman dies domiciled in Scotland her property shall be disposed of in a particular way. Now when we are remodelling sect. 3 in a way which is necessary in order to give it the effect which the legislature intended, why should we not remodel it in such a way as to say that sects. 6 and 7, which are evidently upon the face of them expressed in general terms and apply to marriages either before the Act or afterwards, shall have their full operation? Why are we to put in words which would exclude this case? I do not think that the legislature intended to exclude it. If I saw that the legislature intended to do so and that there would be some obvious reason for their doing so, I might strain the words a little in order to exclude the case. But it seems to me a most natural thing to say that such an alteration in the law of succession shall apply to marriages whether before or after the Act, provided the wife dies domiciled in Scotland after the passing of the Act.

My Lords, entertaining that view, I think we must necessarily say that the ground upon which the Court below proceeded is right, and that the interlocutor ought to be affirmed and the appeal dismissed with costs. I accordingly so move your Lordships.

LORD WATSON:—

I also am of opinion that the interlocutor of the Inner House is right, and that the appeal ought to be dismissed with costs.

The judgment of the Lord Ordinary in this case was in favour of the appellants; but his Lordship seems to have decided against the respondent, unwillingly and contrary to the bent of his own

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mind. He thought that the policy of this Act, as he felt himself compelled to construe it, was somewhat harsh in its effect upon the interests of the husband. I do not think it necessary at present to consider the policy of the Act; but it appears to me that the view taken of its provisions by the Lord Ordinary began at a wrong point. He goes first to the two sub-sections of sect. 3, and finding there the expression "the provisions of this Act," he at once comes to the conclusion that the expression must necessarily include the whole other enactments of the statute; and it is upon that inference that the judgment of his Lordship proceeds. Now I am unable to accept the view thus put forward by the learned Lord Ordinary. It appears to me that the proper way to look at this case is first of all to consider the terms of those enactments which are said to be inapplicable to persons whose marriage has been celebrated prior to the passing of the Act. As has already been noticed by my noble and learned friend, the terms of sects. 6 and 7 of the Act are absolute; and the only condition upon which they give a right, in the one case to the surviving husband, in the other case to the surviving children, is that the wife and mother shall die domiciled in Scotland after the passing of the Act. There is not a word about the place of marriage or the time of marriage, all is made dependent upon that one circumstance, her dying a domiciled Scotchwoman.

In the next place it is necessary to consider whether the positive and unambiguous enactments of these two sections are not to receive effect in the case of a wife dying domiciled in Scotland after the Act but whose marriage took place prior to the Act. That is a case which is said to be excluded from the operation of sect. 6 by virtue of sect. 3 of the Act. Now in some respects sect. 3, if it was intended to have the effect contended for by the appellants, is not happily expressed; for, unlike those clauses which it is said to cut down, which are expressed in plain and intelligible language, the language of sect. 3 is not plain. I will hardly go the length of saying that it is unintelligible: it is awkward and inappropriate language, and does not seem very well calculated to have the effect for which the

appellants contend. Where you have a proviso of this kind, it is generally introduced in order to meet cases to which, but for the proviso, the other provisions of the Act would apply. Now there are provisions of this Act which would not have applied to marriages contracted before the Act, even if sect. 3 had never been enacted. Though sect. 3 had never been enacted, a husband under a marriage contracted before the Act would not have lost any right of jus mariti, because the positive enactments of the statute, apart from sect. 3, only take away their jus mariti from husbands married after the passing of the Act. But the exception attached to the proviso plainly shews that it was meant to be a positive and direct enactment to the effect that in the case of the husband of a marriage contracted before the Act he should lose his jus mariti as to acquirenda after the date of the Act; and all this roundabout language was introduced for that purpose. But, as has been pointed out by my noble and learned friend, it shews what was in the mind of the framer of the clause—it shews what he was referring to as "the provisions of the Act;" and the only specimen which he gives us of the provisions of the Act, is with reference to the provisions of sects. 1 and 2 of the statute. I entirely concur in the observations which have been made by my noble and learned friend upon that point.

There is another matter which, to my mind, is not altogether without weight, and that consideration is that we find here the subject-matter of enactment of the 3rd clause and its sub-sections described as "the case of marriages." The question is, in what sense did the legislature use the word "marriage"? Did they mean a marriage after its dissolution, or did they mean by it a subsisting contract between two living spouses? I am strongly inclined to think that it was intended to bear the latter of these meanings—that the legislature did not intend by that enactment to make provision for anything except the rights and interests of spouses stante matrimonio; and that is precisely the object and scope of clauses 1 and 2.

But, my Lords, I am content with the reasoning in the Court below as to the inapplicability of sub-sect. 2 of clause 3 to the case of this pursuer. Nothing can be more clear than that the

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words "provisions of this Act" cannot apply to the whole provisions of the Act. It is out of the question to suggest that the expression includes clause 4, admittedly it does not. It appears to my mind to be equally out of the question to suggest that it applies to sect. 5, which is a remedy given to deserted wives whose husbands refuse to come forward and give that consent which is necessary to the due and proper administration of their estates. On what conceivable ground should a deserted wife who had the misfortune to have been married before the passing of the Act be refused this remedy?

I shall not go through the whole of this statute. I concur in the observations which were made by the learned judges of the Inner House in the Court below and by your Lordship to-day.

LORD FITZGERALD concurred.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 16th July, 1883.

Agent for appellants: *Andrew Beveridge.*
Agents for respondent: *Grahames, Currey, & Spens.*

[HOUSE OF LORDS.]

THE GREAT EASTERN RAILWAY COMPANY . . . . . } APPELLANTS;

THE HACKNEY DISTRICT BOARD OF WORKS . . . . . } RESPONDENTS.

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Metropolis Management Acts 1855 (18 & 19 *Vict. c.* 120), *ss.* 96, 105, 250, *and* 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*New Street carried over Railway by Bridge —Owner of Land bounding or abutting on New Street—Railway below Level of New Street.*

A railway line ran in a deep cutting much below the level of a highway, which was carried over the railway (nearly at right angles) by a bridge built by the railway company under statutory powers and in pursuance of sects. 46–51 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20). The parapets of the bridge consisted of two walls resting upon arches which had their foundations (outside the lines of the roadway) in the railway company's land. The walls were not used by the company otherwise than as fences for the bridge. The district board of works having paved the highway which was admitted to be a new street within s. 105 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120):—

Held by LORDS BLACKBURN, WATSON, and FITZGERALD, reversing the decision of the Court of Appeal, that, assuming the fence walls to be the railway company's land, the company were not "owners of land bounding or abutting on" the highway within sect. 77 of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102), and were not liable as owners of the fence walls to contribute to the expenses of paving.

Held, also, by LORDS BLACKBURN and WATSON, that the railway line and slopes being much below the level of the highway, the company were not in respect of such line and slopes "owners of land bounding or abutting on" the highway within the above section, and were not liable as owners of the line and slopes to contribute to the expenses of paving.

APPEAL from an order of the Court of Appeal.

The facts are fully set out in the report of the decision below (1) and in the judgment of Lord Watson in this House.

May 10. *Arthur Charles* Q.C. and *French* for the appellants:—

The appellants are not "owners of land bounding or abutting

(1) 9 Q. B. D. 412.

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on such street" within 25 & 26 Vict. c. 102 s. 77; street being defined by 18 & 19 Vict. c. 120 ss. 105, 250: *Angell* v. *Paddington Vestry* (1); *Plumstead Board of Works* v. *British Land Company* (2). The decision in *London and Brighton Railway Company* v. *St. Giles* (3) where the facts were similar except that the street was not new, is right. To make a person an owner of land he must be capable of deriving a benefit from it. The wall of the bridge being a mere fence or railing is really part of the bridge, and therefore of the street. By s. 46 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) a railway company which crosses a road must make a bridge, and must metal and repair the bridge and road and approaches: *North Staffordshire Railway Company* v. *Dale* (4); and must build a good and sufficient fence on each side of the bridge: s. 50. The bridge itself, walls and all, is irrevocably dedicated to the public. The appellants do not use the bridge for their own benefit by letting it for advertisements or otherwise. The respondents have the entire control of the street which by s. 250 of 18 & 19 Vict. c. 120 includes the bridge, and the appellants have nothing to do with the bridge except the burden of repairing it. The bridge (being a "street") is with all its materials "vested" in the respondents by s. 96 of 18 & 19 Vict. c. 120. Upon similar words "vest in" in the Public Health Act of 1875 (38 & 39 Vict. c. 55, s. 149) the right to demise the pasturage passed: *Coverdale* v. *Charlton* (5). If the appellants when they built the bridge had risked an indictment they might have built it without walls, and then the judgment of the Court of Appeal would have had no foundation. The wall is as much a part of the bridge as the girders or the bed.

Sir *H. Giffard* Q.C. (*Poland* and *Avory* with him) for the respondents:—

The decision of the Court of Appeal was right and for the reasons there given. These Acts apply only to the metropolis, and the legislature must be taken to have known what was being

(1) Law Rep. 3 Q. B. 714.
(2) Law Rep. 10 Q. B. 16, and in Ex. Ch. 203, 207.
(3) 4 Ex. D. 239, 242.
(4) 8 E. & B. 836.
(5) 4 Q. B. D. 104.

done in places such as this. The respondents though they do not now use the walls may do so at any time by letting for advertisements, or building over their line or otherwise. "Street" includes the road part of the bridge but nothing more: not the walls, which belong to the appellants, and are "land." *London and North Western Railway Company* v. *St. Pancras* (1) and *Pound* v. *Plumstead Board of Works* (2) are strongly in favour of the respondents. [The learned counsel did not argue that the appellants were "owners of land bounding or abutting on" the highway, in respect of their line, or embankment slopes, or of any other land than the bridge walls.]

Charles Q.C. in reply:—

London and North Western Railway Company v. *St. Pancras* (1) does not deal with a case where by statute the railway company are bound to fence the bridge. Under s. 50 of the Railway Clauses Consolidation Act 1845 it would be illegal and indictable to build a bridge without a fence.

The House took time for consideration.

June 11. LORD WATSON:—

My Lords, the facts of this case are simple enough, but the questions of law to which they give rise are attended with considerable difficulty.

A street in the Hackney district, known as Cazenove Road, runs nearly at right angles to the appellants' line of railway (which at that point is in a deep cutting) and is carried over the railway by means of a bridge. The roadway of the bridge, measuring from parapet to parapet, is of the same uniform width as the remainder of the street. The parapets of the bridge consist of two brick walls bounding the roadway, which rest upon arches of brickwork, having their foundations (outside the lines of the roadway) in the land of the appellant company.

The respondents have paved part of Cazenove Road, which is admittedly a new street in the sense of sect. 105 of the Metropolis Management Act 1855, and they now maintain that the

(1) 17 L. T. (N.S.) 654. (2) Law Rep. 7 Q. B. 183.

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appellants are liable to contribute to the expenses of that operation, inasmuch as they are owners of lands bounding or abutting on both sides of the roadway of the bridge, within the meaning of sect. 77 of the Metropolis Management Act 1862. On each side of the bridge there is a narrow way or passage, the private property of the appellants, leading directly from Cazenove Road to their railway, and it is not disputed that the appellants are liable to contribute in respect of these two passages as bounding or abutting on the street. The controversy between the parties is confined to those portions of the street which are lined by the parapet walls of the bridge.

A Divisional Court of the Queen's Bench, consisting of the Lord Chief Justice and Manisty J., decided in favour of the appellants, holding that the present case was ruled by that of the *London and Brighton Railway Company* v. *St. Giles* (1). The Court of Appeal (Baggallay, Brett and Holker L.JJ.) unanimously set aside that decision, on the ground that the parapet walls of the bridge are lands owned by the appellants, within the meaning of sect. 77 of the Act of 1862.

I agree with the observation made in the Court of Appeal (2) that the *London and Brighton Railway Company* v. *St. Giles* (1) is not an authority which the judges of the Queen's Bench were bound to follow, seeing that judgment went in favour of the railway company on the express ground that the roadway of the bridge was not a new street. That being so, it became quite unnecessary to determine whether the railway company would have been liable if the bridge had been part of a new street. Still, the deliberate opinion of the Court is entitled to its due weight, because, although unnecessary to the ultimate disposal of the case, it was formed and expressed after hearing full argument on the point. In the case stated by the magistrate there was no mention made of parapets or bounding walls, and though presumably there must have been some sort of fence for the protection of wayfarers, Hawkins J., who delivered the opinion of the Court, deals with the question as if the whole upper portion of the bridge had consisted of roadway or street.

It was maintained on behalf of the appellants that the bridge

(1) 4 Ex. D. 239. (2) 9 Q. B. D. 418, 419.

in Cazenove Road, including the carriage-way, footpaths, and parapet walls, is now vested in the respondents by virtue of certain enactments contained in sect. 96 of the Metropolis Management Act 1855. That clause (inter alia) provides that all streets being highways, and the pavements, stones, and other materials thereof, shall vest in and be under the management and control of the vestry or district board. And as the interpretation clause of the Act (sect. 250) declares that the word "street" shall "apply to and include" any bridge not being a county bridge, it was argued that the fabric of the bridge in question, at least to the extent above indicated, must be held to have passed to and become vested in the respondents in terms of sect. 96.

I am unable to assent to the appellants' argument upon this part of the case. It was assumed, no doubt rightly, by the counsel on both sides of the bar, that the rights and liabilities of the appellants, with reference to this bridge, were regulated by the Railways Clauses Act 1845. The object of the enactments of that statute, so far as these bear upon the present case, was to compel railway companies to provide and maintain convenient roads, in substitution for such portions of turnpike roads or public highways as might be intersected by their line of railway. In the case of the company electing to keep their line below the level of the substitute road, the language of the Act appears to me to distinguish the road itself from the bridge by which it is to be carried over the line. Sect. 46, in that case, provides that the "road" shall be carried over the railway "by means of a bridge." Again, sect. 50 enacts, with regard to "every bridge erected for carrying any road over a railway," that there shall be a good and sufficient fence "on each side of the bridge," and also that "the road over the bridge" shall have a clear space of a certain width between the fences thereof. The real import of these enactments is, that the substitute road shall be supported by means of a bridge provided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes. In my opinion the right of the public, or of the highway authority, is not thereby enlarged. Their right is, in the first place, in and to the road, and may extend to the materials of which it is composed; and in the second place, to have

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subjacent support to the road from a properly constructed bridge. They are also entitled, in terms of the statute, to have the road maintained, and to have the bridge kept properly fenced by the railway company; but these provisions do not appear to me to imply that they are to have any greater interest in the bridge and its fences, as distinguished from the road proper, than they had in the strata upon which the original road rested. These remained the property of the landowner, although burdened with a public right of way in perpetuity.

The Metropolis Management Acts do not, in my opinion, confer upon district boards any larger right in the streets and highways placed under their charge than had previously belonged to the public. The statutory functions of the district board are limited exclusively to the surface of the road or street proper. In the case of new streets, what sect. 105 of the Act of 1855 authorizes the board to do is to "pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair." Keeping in view, then, that the sole object of vesting streets, and the materials of which they are composed, in district boards is to enable them effectually to perform their statutory duties in relation to the streets, I cannot suppose that the Legislature, in enacting that the word "street" shall "apply to and include" any bridge, intended to vest in the board anything more than the street which is carried or supported by the bridge.

Accordingly, I understand the position of matters to be this. The whole bridge, from its foundation upwards, is part and parcel of the appellants' land, with the exception of those portions of it, consisting of the carriage-way and footpaths, and the materials of which they are made, which have become vested in the respondents by force of statute. The bridge, with that exception, appears to me to be as much the appellants' property as an embankment would be, constructed upon land acquired for that purpose, in order to carry the approaches to the bridge.

Although the parapet walls of the bridge in question are, in my opinion, part of the appellants' land, that does not appear to me to be, of itself, necessarily conclusive of their liability to contribute to the expense of paving Cazenove Road. If these walls

had been erected by the appellants at their own hand and for their own purposes, the present case would have been within the principle of *London and North Western Railway Company* v. *St. Pancras* (1). As I understand the facts of that case, the line of the railway company ran parallel to, but at a depth of 18 feet below, the level of the street. On the side of the railway next to the street the company built a retaining wall, which was carried up to the edge of the street and for several feet above its level. I think the Court were right in holding that the wall was land of the railway company abutting on the street, because, to my mind, it is obvious that the wall was necessary for the construction of the line and the protection of traffic upon it, and, in short, formed part of the works from which the company were deriving profit. I do not think *London and North Western Railway Company* v. *St. Pancras* (1) differs in principle from *Higgins* v. *Harding* (2). It seems to me that no substantial distinction can be taken between the retaining wall of a railway cutting and the retaining wall of a railway embankment.

The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed "extra commercium," or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862. In *Angell* v. *Paddington* (3) it was decided by the Court of Queen's Bench that a church abutting upon a new street, the site of which had been conveyed to the Commissioners for building new churches, is neither a "house" nor "land" within the meaning of the Metropolis Management Acts. Then, in *Plumstead* v. *British Land Company* (4) it was held by the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the owners of the solum of roads which had been dedicated to the public, were not, although these roads abutted on a new street, owners of "land" within the meaning of these Acts. The Court of Queen's Bench had previously decided in *Lord Northbrook* v. *Plumstead* (5) that the owner of the soil

(1) 17 L. T. (N.S.) 654.
(2) Law Rep. 8 Q. B. 7.
(3) Law Rep. 3 Q. B. 714.
(4) Law Rep. 10 Q. B. 203.
(5) Law Rep. 7 Q. B. 183.

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of certain private roads leading out of a new street was liable to contribute in terms of sect. 77, and the view taken by that Court in *Plumstead* v. *British Land Company* (1), seems to have been that there was really no difference in principle, but only an immaterial difference in degree, between the case of a public highway and that of a road, the use of which had been granted to private proprietors. In the Exchequer Chamber a somewhat broader view was taken of the policy and import of the enactments of section 77. Lord Coleridge, in whose opinion the other five judges constituting the Court concurred, there lays it down that the property to which the legislature intended to attach liability was, in popular language, either house property or land property in the street; that the public roads belonging to the company were not such land property, in any reasonable sense, and consequently that the company were not owners of land within the meaning of the statutes.

The circumstances of the present case are, in my estimation, materially different from those with which the Court of Queen's Bench had to deal in *London and North Western Railway Company* v. *St. Pancras* (2). The parapet walls and their supports were not erected by the appellants at their own hand and for their own railway purposes, but under the compulsion of a statutory enactment made in the interest and for the benefit of such members of the public as might have occasion to use that part of Cazenove Road which crosses the line of railway. Nor does the present case appear to me to come within the principle of *Lord Northbrook* v. *Plumstead* (3), because, as was pointed out by the judges who decided that case, the use of his private roads was part of the consideration in respect of which his Lordship's tenants agreed to pay rent, so that he was actually getting a return from them in the shape of rent. But should these parapets, and the bridge itself, which are a source of expense and not of profit to the appellants, be taken down, the earnings of the appellants' railway would not be thereby affected.

On the other hand, it must be conceded that these parapet walls are not, in all respects, in the same position as soil irrevocably dedicated to the public as a highway. If they were, I

(1) Law Rep. 10 Q. B. 16, 26, 27. (2) 17 L. T. (N.S.) 654.
(3) Law Rep. 7 Q. B. 183.

should have little difficulty in holding that the present case was ruled by *Plumstead* v. *British Land Company* (1). The surface of land occupied as a highway is incapable of being turned to profitable account by the owner, without encroaching on the rights of the public. In the case of a bridge carrying a public road across a railway, the statutory obligation of the company is to provide and maintain "a good and sufficient fence on each side of the bridge of not less height than four feet" (2); and it has been argued that inasmuch as the parapet walls which they have erected remain the property of the appellant company, they may be used by the company for any profitable purpose not inconsistent with their continuing to be efficient fences. The only such purpose to which it was suggested that the walls in their present state might be turned was the letting of their surfaces for posting advertisements. The suggestion is ingenious, and may or may not have some possible foundation in fact, but it fails to satisfy me that the legislature in framing the Metropolis Management Acts intended to deal with the surface of a mere roadside fence as "land" which might be let at a rack-rent.

Another suggestion, to my mind much more worthy of consideration, was this, that the appellants may take down these parapet walls and erect tenements supported by arches in their stead, abutting and opening upon the street. I am not prepared to say that such a proceeding would be ultra vires of the company, but the suggestion does not appear to have any bearing upon the character of these parapet walls. If, as they now stand, these walls are not "land" within the meaning of the statutes, I do not think they ought to be regarded as "land," because they may be removed in order that the appellants may build houses or offices abutting on the foot pavements of the bridge. I can understand, however, an argument to the effect that the land of the appellants ought, notwithstanding its being at present below the level of Cazenove Road, to be considered as bounding or abutting upon the street in the sense of the statutes, seeing that the appellants may erect buildings upon it along the sides of the bridge.

(1) Law Rep. 10 Q. B. 203.

(2) The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 50.

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Being unable to come to the conclusion that these parapet walls are land owned by the appellant company within the meaning of the Metropolis Management Act, I am compelled to consider whether the land owned by the appellants, irrespective of these parapets, bounds or abuts upon Cazenove Road. If the land of the appellants were on the same level as the street, and only separated from it by the walls in question, I should be inclined to hold that it none the less abutted on the street because of that separation. But the appellants' railway and the slopes on either side of it are very much below the level of the street; at least I so infer from the statement in the case, which is that the line of railway is in a deep cutting. In its present condition, therefore, it appears to me that the appellants' railway bounds or abuts upon Cazenove Road, in much the same sense in which the waters of the Thames might be said to bound or abut on the foot pavements of Westminster Bridge, and that is not, according to my opinion, the sense in which the words "bound" and "abut" are used in the Metropolis Management Acts. But the question still remains, must not the appellants' land be deemed to abut upon the street, seeing that, without interfering with its use for railway purposes, part of it at least might be utilised in order to support a line of buildings along both sides of the bridge?

Whether land situated below the level of a street is or is not to be deemed as abutting upon it within the meaning of the statutes, appears to me to be a question of degree depending upon the circumstances of the case. One can easily imagine a case in which it would be scarcely possible to suggest that land in that position could be utilised for any other purpose than that of erecting buildings upon it having a frontage to the street; and it is not more difficult to figure a case in which it would be beyond the bounds of reasonable probability to suppose that the land could be utilised for any such purpose, although there were no absolute physical impossibility in the way. There are many cases lying between these two extremes, and the present appears to me to be one of them. To the best of my judgment the appellants' land cannot in any reasonable sense be said to bound or abut upon the street in question. I think that, as it is laid out

and used at the present time, the land does not, in point of fact, bound or abut upon the new street which has been paved by the respondents. It is used no doubt to support fences which do bound that new street; but these fences are mere accessories of the public highway, and are not in my opinion land capable of yielding a rack-rent to the appellants within the meaning of the statutes. The present use of their land as railway, and the maintenance of these fences in their present condition, are strictly in accordance with the statutory powers and liabilities of the railway company; and I do not think that the possibility of the company one day or another making a different use of their land is attended with such imminent probability as would justify me in treating their land, for the purposes of this case, as if the change had actually been made.

I therefore move that the judgment of the Court of Appeal be reversed with costs, and that of the Queen's Bench Division restored.

LORD BLACKBURN:—

My Lords, I have requested the noble and learned Lord (Lord Watson) to speak first, because having read his opinion, I find that I quite agree with him as to the facts and the points to be decided, and I should unnecessarily delay your Lordships by saying over again what he has said.

The difficulty, which is in my mind considerable, arises from the necessity of construing the words of 25 & 26 Vict. c. 102 s. 77, "the owners of the land bounding or abutting on such street shall be liable to contribute as well as the owners of houses therein," when applied to such property as is described in the special case. I think that neither the land beneath the bridge, where the road is carried on the bridge, nor the bridge itself so far as it is beneath the road, could properly be said either "to bound or abut" on the new street into which that road has been turned. In one sense no doubt it may be said that such subjacent land does bound the street, but not I think in the sense which, from the context, it must be taken that the Legislature intended to express in 25 & 26 Vict. c. 102 s. 77. On the other hand I think that the land which runs along each side of the line of

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street does bound and abut on it, whether that land be steep or not and whether built on or not. And consequently I think that the decision in *London and North Western Railway Company* v. *St. Pancras* (1) was right. But, to adopt the illustration used, I do not think that the land covered by water, on which the Thames flows, either bounded or abutted on the road which was carried over old London Bridge, though I think that the houses which stood on each side of the road which was carried over old London Bridge did both bound and abut on that road; and, if we can suppose such a case, if that road had been turned into a new street, those houses would have been liable to contribute to the expense of paving it. And I think that in this I do not differ from the Court below. This disposes of all but the parapets and fences of the bridge.

I agree with Lord Watson in thinking that the whole bridge, from its foundation upwards, is part of the appellants' property, with the exception of those portions of it, consisting of the carriage-way and footpaths and the materials of which they are made, which have become vested in the respondents by force of the statute. The parapets or fences of the bridge are not, I think, vested in the respondents; they remain part of the appellants' property; and, as the bridge of which they are part is fixed to and so is part of the land, they are part of their land. But the legislature, when framing 25 & 26 Vict. c. 102, had not present to their minds any such case as this. We have, what is always a difficult task, to say what is the intention expressed by the words of the legislature when applied to a state of facts of which they probably were not thinking, and as to which consequently they had not really any intention at all. On this I have had more difficulty than seems to have been felt by either of the two other noble and learned Lords who heard the argument.

I feel that the conclusion to which the Court of Appeal has come is hard upon the railway company, and is scarcely what the legislature, if such a case had been present to their minds, would have wished to say; but I have doubts and difficulty as to whether the legislature have not said it, and therefore have difficulty about reversing the decision. But my doubt and

(1) 17 L. T. (N.S.) 654.

difficulty (for it is no more) is not strong enough to make me dissent from what I find is the opinion of both the noble and learned Lords who heard the argument.

LORD FITZGERALD:—

My Lords, the question brought before us on this appeal is whether the railway company is liable to be rated for paving and maintaining the street called Cazenove Road, Stamford Hill, in respect of the fence walls of a bridge by which that road is carried over the railway. The facts have been already stated, and they are made clear by the photographic views attached to and forming part of the case. It is admitted that Cazenove Road is a new street within the meaning of the statute 18 & 19 Vict. c. 120 s. 105. The company exercised their statutable powers by making a deep cutting through the road for their permanent way, and have carried the road across the cutting by means of a bridge flanked by fence walls. There is a railway station (Stoke Newington) close to the bridge; and, as was to be expected, Cazenove Road has become a street with houses continuously built on both sides, and as such the local board has undertaken to pave and keep it in repair.

The decision of the Court of Appeal seems to have been that the fence walls of the bridge formed no part of the roadway or street, but did constitute land, the property of the company, fronting and abutting on the street on both sides and from one end of the bridge to the other, in respect of which the company was liable to be rated. It would seem from the judgment of the Court of Appeal that if there had been no fence walls, or if the fence, whatever it was, stood within the limits of the old roadway, the decision of that Court would have been for the company. The question is one of construction of several statutes, and I prefer considering it irrespective of the cases which have been quoted. The company had authority by statute to carry their railway across the Cazenove Road, and had an option in doing so to carry the road over the rail by means of a bridge of the requisite dimensions. The statute 8 & 9 Vict. c. 20 s. 46 provides that "such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all

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times thereafter maintained at the expense of the company." Sect. 50 of the same statute enacts rules for the construction of bridges to carry a road over the railway; and, amongst others, that "there shall be a good and sufficient fence on each side of the bridge, of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet;" and that the road over the bridge shall, in case of a turnpike road, have a clear space between the fences of thirty-five feet. Sect. 51 provides that if the available width of the road should thereafter be increased beyond the width of the bridge, the company should be bound, at the request of the trustees of the road, to increase the width of the bridge. The regulations thus made are for the public safety and convenience. The statute does not prescribe what the fences of the bridge should be made of, and it may be that a fence of wood or of iron, or an iron rail, might constitute a good and sufficient fence. In the case before us the fence appears to be a brick wall. It seems also that although the bridge must have a clear space of certain dimensions between the fences, it need not necessarily be of the same width as the roadway of the road with its footpaths (if any); and we may suppose instances in which the whole bridge with its fence walls might be erected within the boundaries of the roadway as it stood before being interfered with by the company.

The bridge in question, with its fence walls and approaches, was, I assume, made in conformity with the regulations of the statute. When completed, with its fence walls, it was intended by the legislature as a substitute for the piece of public road or public highway which the company had appropriated to the use of the railway. It seems to me that the roadway and the fence walls are parts of one entire thing, and form together the statutable bridge provided for the public convenience and safety in lieu of that which the company had taken, and are to be "at all times thereafter maintained at the expense of the company" for the use of the public.

In the view which I take, it is not necessary now to consider in whom the property in the bridge and its necessary works was vested when completed and opened for public use. The determination of that question, if it was necessary, would involve the

consideration of some rather complicated statutes; but assuming that the legislature intended, by the Act of 8 & 9 Vict. for wise purposes and for the protection of railway companies, that save as to the mere roadway or space between the fences the dominion should belong to the company, so as to prevent any other body or person interfering with the structure, it was nevertheless a dominion given to or left in them for the benefit of the public, and subject to the obligation of maintaining the structure for the public use and at their own cost.

I now proceed to consider the question arising under the subsequent statutes of 18 & 19 Vict. c. 120 s. 105, and 25 & 26 Vict. c. 102 s. 77, and for that purpose I shall assume that the following passage from one of the judgments in the Court of Appeal is in fact accurate (1): "We are bound to say that there is a street running across the bridge; but I take this to be clear, that that street consists only of the width of the footway and carriage-way. The walls which are at the side of this bridge along the whole length of it on either side, I take it to be clear are not part of the street; they are no more part of the street than if those walls were the walls of houses on land and built on the same level as the roadway; and the houses which bound the street have been held to be, and in my opinion clearly rightly held to be, not part of the street. They form the street, but they are no part of the street. If they were part of the street they would vest in the local board, which is absurd. Therefore, I think that the walls of this bridge are no part of the street. Then what are they? They are walls supported by brickwork (it does not signify very much whether by brickwork or not) or by permanent work fixed into land." And I shall further assume that the walls of the bridge rest on a structure fixed into land belonging to the company, and that, as such, the walls represent land in legal and technical phraseology, and that the ownership of both land and walls is in the company.

The question, then, is whether the company is liable to be rated in respect of these fence walls. Every owner of land bounding on the street is not necessarily liable to be rated (I may refer

(1) Taken from the shorthand notes of the judgment of Brett L.J. printed in the Appendix before the House. For the revised report see 9 Q. B. D. 420.

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to *Plumstead Board of Works* v. *British Land Company* (1) on appeal, and to other authorities cited by my noble and learned friend), but only such owners as come within the interpretation clause, sect. 250 of the first of the two Acts, which declares "owner" to mean the person for the time being receiving the rack-rent, or who would receive the same if let at a rack-rent. Then is this company, in respect of those fence walls, the owner of land within that meaning? In my humble judgment they are not such owners. The bridge is, by the statute, dedicated to public use, and its fence walls are provided for public protection; and if the ownership and control of the walls is in the company, it is so for public purposes and subject to the obligation of perpetual maintenance, unless and until some other good and sufficient fences shall be provided by the company in their stead for the public protection. The company could not let the walls at a rack-rent; and if they might use them for any purpose, it must be a use subordinate to the public purposes to which the bridge, as a structure, is in its whole devoted.

If the view that I have taken is correct, it is unnecessary to consider the cases which have been cited, or the very learned reasons given in the Court of Appeal for their judgment now under consideration; but I desire to say that having heard the very able and elaborate judgment of the noble and learned Lord (Lord Watson), I concur in his criticisms on the authorities which he has cited and in the final conclusion at which he has arrived.

Order appealed from reversed: order of the Queen's Bench Division restored; respondents to pay the costs in the Court of Appeal and of this appeal; cause remitted to the Queen's Bench Division.

Lords' Journals 11th June 1883.

Solicitor for appellants: *Capel A. Curwood.*
Solicitor for respondents: *Richard Ellis.*

(1) Law Rep. 10 Q. B. 203.

[HOUSE OF LORDS.]

THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY } APPELLANTS;

H. W. BROWN . . . . . RESPONDENT.

H. L. (E.) 1883 July 23.

Railway—Carrier—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Alternative Rates.*

A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market:—

Held, reversing the decision of the Court of Appeal, that upon the facts the merchant had a bonâ fide option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) s. 7, and covered the delay; and that the company were not liable for the loss.

APPEAL by the defendants from an order of the Court of Appeal (1).

The facts stated by the County Court judge in a case for the opinion of the Queen's Bench Division, so far as they are material to this report, were as follows:—

The plaintiff, a fish merchant at Grimsby, had been in the habit for years of delivering to the defendants to be forwarded to the Billingsgate market consignments of live cod fish, and on or about the 28th of December 1880 signed a "risk-note," in the words and figures following:—

"Manchester, Sheffield and Lincolnshire Railway.

"Risk-note.

"Grimsby Docks Station 28th Dec. 1880.

"Mr. Henry Brown.

"FISH TRAFFIC.

"Sir,

"I beg to inform you that to parties willing to free and

(1) 10 Q. B. D. 250.

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relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted.

"I am, Sir,

"For and on behalf of the Company,

"Your obedient servant,

"James Reed."

"And for smacks :

"*Adventure*,

"*Afghan*,

"*Zulu*,

"*Amity*.

H. W. B.

"28th Dec. 1880.

"Sir,

"In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

"This undertaking to remain in force from the present date until 31st Dec. 1885.

"I am, Sir,

"Your obedient Servant,

"Henry William Brown."

The whole of the above risk-note, with the exception of the plaintiff's name, was in a lithograph form, furnished by the company.

After the making of the risk-note, all fish delivered by the plaintiff to the defendants to be forwarded was forwarded by them at the rate mentioned therein. On the 13th of April 1881 the plaintiff delivered to the defendants to be carried from Great Grimsby to London a load of cod fish, which they accepted, though owing to the heavy traffic (being two days before Good Friday) it could not be forwarded in time for the Billingsgate market. No notice of this was given to the plaintiff who, if notice had been given, could have kept his fish alive and avoided loss. The fish lost the market, and the plaintiff suffered a loss, the amount of which was agreed upon as £1.

The judge held that the defendants had failed to justify the

delay in delivering the fish consigned to them for carriage, and that they were not protected by the risk-note, and directed judgment to be entered for the plaintiff for £1 and costs. The question for the opinion of the Court was whether such judgment was right.

The Queen's Bench Division (Mathew and Cave JJ.) entered judgment for the defendants (1). The Court of Appeal (Baggallay, Brett and Lindley L.JJ.) reversed that decision and entered judgment for the plaintiff (2).

The judge's notes of what passed at the trial before him on the 29th of July 1881 were also among the papers before the House, and from these it appeared that the plaintiff admitted on cross examination that he "might have saved £20 by the risk-note that year;" and stated that "persons who sign risk-notes send their fish if they wish to do so on the ordinary terms by sending it in somebody else's name."

July 20, 23. Sir *F. Herschell* S.G. (*Gully* Q.C. and *C. A. Russell* with him) for the appellants:—

The question is whether this contract made by a sane adult trader of experience is just and reasonable within sect. 7 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) (3).

(1) 9 Q. B. D. 230.

(2) 10 Q. B. D. 250.

(3) Sect. 7: "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable . . . . Provided also that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage . . . ."

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It was agreed on the arguments in both Courts below (1) that there was a published legal rate at which the fish might have been carried with the full liability as common carriers. The rate being statutory the contract was just and reasonable. There is no evidence to shew that the difference in rate is not a fair equivalent for the difference in risk, and the facts that the plaintiff saved £20 in seven months by choosing the lower rate, and that many other traders preferred the lower rate and lower risk, and others preferred the higher rate, gave strong evidence that it was a fair equivalent in his case. The words in the risk-note, "or from whatever other cause arising," would cover any gross negligence in the transit but probably not a wilfully tortious act. But even if it did cover wilful misconduct that is reasonable; the object being to avoid costly litigation. There being an alternative rate which gave the plaintiff a choice the condition complained of is reasonable. The want of an alternative was the ground of the decision in *Peek* v. *North Staffordshire Railway Company* (2), per Blackburn J.; and see *Simons* v. *Great Western Railway Company* (3); *Lewis* v. *Great Western Railway Company* (4); *Allday* v. *Great Western Railway Company* (5); *Rooth* v. *North Eastern Railway Company* (6). This is not like the case where the company practically compels the adoption of the lower risk by refusing to carry on any other terms. Clearly the company can relieve themselves of part of their common law duty; then why not of the rest, for a sufficient consideration?

[LORD BRAMWELL referred to his own judgment in *Lewis* v. *Great Western Railway Company* (7), approved by Lord Fitz-Gerald in *Moore* v. *Great Northern Railway Company* (8).]

The mistake of the Court of Appeal was in supposing the plaintiff had practically no option. If the lower risk does not compensate traders the plaintiff could distance his competitors by carrying at the higher rate. It is not necessary to contend

(1) 9 Q. B. D. 232, 233; 10 Q. B. D. 252, 253.
(2) 10 H. L. C. 473, 512.
(3) 18 C. B. 805.
(4) 3 Q. B. D. 195.
(5) 5 B. & S. 903, 907, 908.
(6) Law Rep. 2 Ex. 173, 178.
(7) 3 Q. B. D. 205.
(8) 10 Ir. Law Rep. Q. B. D. 95, 107.

that an alternative rate would prevent any condition from being unreasonable, such as a condition as to something not relating to the contract. The objection that the company are not bound to carry at all under this contract is not sound. They are bound on the same principle as in shipping cases. This contract is divisible: *Robinson* v. *Ommaney* (1). It must be read distributively as exempting the company separately from each ground of liability, misfortune, negligence, misconduct, &c. It may be bad as to some and good as to the one now in question.

[LORD BRAMWELL referred to *Green* v. *Price* (2).]

In *Finlay* v. *North British Railway Company* (3) the natural meaning of the words was construed away, so as not to include such a case as the present. Consequential damage by delay is not within the Railway and Canal Traffic Act; the words being "loss of or injury done to," the same as in the Carriers Act (11 Geo. 4 & 1 Will. 4 c. 68 s. 1), which did not cover damage by delay: *Hearn* v. *London and South Western Railway Company* (4).

Webster Q.C. and *Bray* for the respondent:—

First, this contract does not cover negligence of the carrier or his servants; secondly, if it does it must cover wilful misconduct, and if so it is clearly unreasonable. The negligence here was not in transit, but in receiving the fish at a time when the company knew or must have known they could not carry it. The onus of establishing an effective practical alternative rate lies on the company. The company are not exempted from liability for the negligence of their servants unless the contract expressly so provides. If the general words "from whatever other cause arising" can have any meaning other than a reference to the company's negligence, that meaning should be given: *Phillips* v. *Clark* (5); *Czech* v. *General Steam Navigation Company* (6); *Steel* v. *State Line Steamship Company* (7); *Beal* v. *South Devon Railway Company* (8). It is for the company to prove an effective alternative

(1) 23 Ch. D. 285.
(2) 13 M. & W. 695; 16 M. & W. 346.
(3) 8 Court Sess. Cas. 3rd Ser. 959.
(4) 10 Ex. 793.
(5) 2 C. B. (N.S.) 156.
(6) Law Rep. 3 C. P. 14.
(7) 3 App. Cas. 87.
(8) 3 H. & C. 337.

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rate. Without an alternative the cases clearly shew that such a condition would be unreasonable, and there was no practical effective alternative here. The condition is not separable from the contract. If bad in part it is wholly bad. The condition covers wilful misconduct, if anything; for there are no words to exclude wilfulness. The company ought to have warned the plaintiff that the fish could not be carried: *McConnachie* v. *Great North of Scotland Railway Company* (1); *Jarvie* v. *Caledonian Railway Company* (2). Assuming that there is a bonâ fide alternative and that the condition covers wilful misconduct it is unreasonable; otherwise the appellants must (and do) contend that an alternative rate below the parliamentary rate entitles the company to make any condition they please. That introduces a new qualification into the Act. The company are bound to shew that the difference in rate is a sufficient consideration for the condition: per Lord Cranworth in *Peek* v. *North Staffordshire Railway Company* (3); and this they have not done.

LORD BLACKBURN:—

My Lords, I do not think that we need trouble the Solicitor-General to reply. The case has been argued at great length and is one of importance. There has been a unanimous judgment of the Court of Appeal reversing the judgment of the Divisional Court, but as we have heard the arguments at such length I do not think that there is occasion to take time to consider our decision.

The first thing to be looked at is, What does the contract in this case set out? The appellants say, "To parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded, from any of our stations from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted." The party on the other side, the fishmonger, says, "I request that you will forward all fish delivered by me or on my account from any of your stations at

(1) 3 Court Sess. Cas. 4th Ser. 79. (2) 2 Court Sess. Cas. 4th Ser. 623.
(3) 10 H. L. C. 571, 572.

the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage." The first question which arises is, Supposing that the Railway and Canal Traffic Act were repealed and that we were considering the case free from any difficulty about that Act, would the effect of this contract be to protect the company from the damage which is claimed in this case? It is said that it would not, on two grounds. First, Mr. Webster endeavoured to argue that here the damage was not from any loss, or damage, or delay in the course of the transit, but was from misconduct on the part of the company in not warning the respondent, before he killed his fish and sent them to the station, of the delay which would arise if he sent them, and that that was a cause of action. Next, it was said that such a contract ought to be construed (whatever the parties meant) not to include protection to the company from the negligence of themselves or their servants, that we are forcibly to construe it in that way, though the intention of the parties might be to the contrary. Now there was some ground for maintaining that argument. *Wyld* v. *Pickford* (1) (I think it was) certainly did seem to state that a party in that position was entitled to say that the contract was to be so construed. But then I think *Hinton* v. *Dibbin* (2), now about forty years ago, decided quite the contrary; and there have been a great many cases since, proceeding upon the same principle. I believe that most of them are referred to in the opinion which I delivered in the House of Lords in the case of *Peek* v. *North Staffordshire Railway Company* (3), and the result was what I pointed out, that such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants.

Mr. Webster argued that the case of *Phillips* v. *Clark* (4) and other cases of that kind were inconsistent with that view. I do not think that they are so at all. I think that the reasoning of those cases is this: when an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, "perils of the seas

(1) 8 M. & W. 443.
(2) 2 Q. B. 646.
(3) 10 H. L. C. 497.
(4) 2 C. B. (N.S.) 156.

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excepted." Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, "I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage." And so of leakage, and many other things of that sort. But that does not in the slightest degree shew that when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants.

Passing from that point, we come next to the question whether this contract is made void by the Railway and Canal Traffic Act. There was a great deal of opposition to that Railway and Canal Traffic Act when it was first passed, and many people said that it was most unjust, and so on; but it was ultimately decided, in *Peek* v. *North Staffordshire Railway Company* (1), that it is valid and effectual until the legislature choose to repeal it, to this extent, that contracts, even though signed (which they must be to be valid, and as this contract is), are void if they purport to free a railway or canal company from responsibility for the negligence of their servants, unless they are adjudged reasonable by a judge or a Court. And the question comes to be here, What are the grounds upon which a Court (which your Lordships now are for that purpose) is to consider whether this contract is reasonable or not, and what are you to adjudge upon it? Now on that subject we have certainly an alternative, for in the very terms, and on the face of the contract it is said, "The company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted." So that it is quite clear upon the face of the contract that there is to be a reduction of one-fifth, twenty per cent., from the rates actually charged, if the parties choose to avail themselves of it. I do not think that the mere fact of its being said that there is another charge, would be of itself sufficient to make this contract reasonable. The spirit

(1) 10 H. L. C. 473.

and object of the enactment in the Railway and Canal Traffic Act are very well expressed in *Beal* v. *South Devon Railway Company* (1). "The real question," says Crompton J. in delivering the judgment of the Exchequer Chamber, "is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly." The mischief was supposed to consist in giving a practical monopoly to the railway companies by compelling people to enter into contracts whether they willed it or no. The Act says, "If you have signed a written contract expressing a certain condition, a judge or a Court shall see whether it is reasonable or not." Crompton J. says, and I think rightly says, that in order to judge whether it is reasonable or not you must look at this consideration, Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of that monopoly?

Now I think it will be seen that in this case there was really a reasonable means of the goods being carried, and that the company offered to fulfil their duty as common carriers in saying, "We will carry all goods that are brought to us, fish and otherwise, on being paid a reasonable remuneration—we will carry them according to the custom of the English realm, and will safely deliver the goods unless certain excepted things prevent their being so delivered." There is superadded that which is not part of the custom of the realm, also an obligation to use reasonable care and reasonable skill to deliver the goods within a reasonable time. That is superadded, I think, by the law to the duty which by the custom of the realm is cast upon a carrier; there is that duty to deliver with reasonable dispatch and without unreasonable delay. Now upon that, if the company have really offered and said, and do in fact say, "We will carry your goods, subject to this liability, on payment of a reasonable price," I myself think (although it seems to be treated as an absurdity to reason in that way) that so long as they are offering and are willing to carry at a reasonable price and to fulfil their duty, it cannot be unreasonable to say, "If you prefer your goods being carried on other terms we will agree to it." Whatever these contracts are, the parties are not left at arm's length, and

(1) 3 H. & C. 337, 342.

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the mischief which the Railway and Canal Traffic Act supposed to exist, of individuals and the public being coerced by a practical monopoly, does not arise, for they can have their goods carried according to the terms of the Common Law without being called upon to pay anything more than a reasonable remuneration.

Now I am not prepared to say that where there are maximum rates fixed, as no doubt there are on this railway, everything within these maximum rates must be a reasonable remuneration. I do not say whether that is so or not. That may be a matter worthy of consideration in some other case. But I do say this, that when there has been a rate fixed, if it be shewn in point of fact that although people can have their goods reasonably carried at that rate they do enter into agreements of this sort to have them carried at another rate, that is extremely strong evidence that the agreement is reasonable, and I should think that no Court would fail so to find it if that evidence was produced before them. Now in this case, which is said to be a representative case, that statement is of importance; but it does not appear to have occurred to the learned judge of the county court nor to the people there to consider the point whether or no the ordinary rates, that is to say the rates 20 per cent. higher than the rates charged under this contract, were in fact practically operative in the way I have just mentioned. If they were positively deterrent and merely illusory, and if no fish whatever were sent in that way, it must have been perfectly well known by every one of the fishermen in Grimsby, and perfectly well known I should think to the county court judge. If they were in practical operation and if fish were carried at those rates, that also would be well known. I daresay that if it had occurred to any one that that fact was of importance, there would not have been any difficulty about stating it; but it does not seem to have occurred to any one that it was so, and all that we have really is that the plaintiff himself, after being asked in cross-examination whether he did not make a profit by the risk-note, incidentally says in re-examination, "I know personally the course of practice in sending fish by persons who sign risk-notes. Such persons send their fish if they wish to do so on the ordinary terms by sending it in

somebody else's name." Now it is wonderful that in such a case as this the point should be reduced to that very little piece of evidence, but on that evidence of the plaintiff himself stating that he personally knows that to be the course of business I can form no other conclusion, and I do not think your Lordships can form any other conclusion, than that those ordinary rates, as he calls them, are in practical operation, the railway company finding customers at them, and persons coming at those rates; and that being so, I do not think that any judge ought to ask for stronger evidence than that to enable him to say that there was a real bonâ fide alternative in this case. And Lindley L.J. seems to agree that, if he could have come to the conclusion which I have said that I have come to, namely that there was such a bonâ fide rate, he would have thought that this contract was reasonable enough. But the other two judges in the Court of Appeal, Baggallay L.J. and Brett L.J., seem to argue (as far as I can understand what they say) in this way, that nothing can be reasonable practically between the railway company and the trader, because if the trader does not take the best bargain, and does not choose to do the best thing, he will be undersold by others; so that the trader, no matter whether he is dealing with a railway company or with anybody else, never can be a free agent; if it is a carrier by water the trader is not a free agent, and must send his goods on the cheapest terms that he can without being a free agent. That to my mind is not legitimate reasoning.

LORD BRAMWELL:—Lindley L.J. says so too. He says, "In the case now before the Court the plaintiff was a fish merchant sending his fish to market, and practically he was compelled to send his goods at the lower rate. It is true he was not compelled to do so by the defendants, but it is plain that unless the plaintiff sent his fish as cheaply as he could he would be undersold in the market by his competitors in trade" (1).

LORD BLACKBURN:—If it be a carrier by water or a carrier by land where there are no railways, the trader makes a bargain with

(1) Extract from the shorthand notes printed in the Appendix before the House.

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that carrier if he pleases. It might as well be argued that he is in the same position as he was before the Railway and Canal Traffic Act was passed, without remedy. But then it is said by the legislature in that Act, "Inasmuch as railway and canal companies have a practical monopoly given to them by virtue of their powers, we will protect you against the abuse of that practical monopoly." And I think that that is accurately expressed in the case of *Beal* v. *South Devon Railway Company* (1) in considering whether the condition is an unreasonable condition or not. I should therefore here take it as a matter of fact, and I certainly find that here there is a real practical mode in which fish are carried upon these ordinary terms in actual use, which consequently I must take to be reasonable terms. There is no practical monopoly pressing upon the parties on account of which they are obliged to act in a particular way. They find it to their advantage in their trade to accept the offer of an alternative, and that offered alternative is not unreasonable.

For these reasons, taking this view, I think that the order appealed against should be reversed, and the judgment of the Divisional Court restored; and of course the costs will be paid by the respondent. I accordingly so move your Lordships.

LORD WATSON:—

My Lords, I so thoroughly agree with the observations which have been made in this case by the noble and learned Lord who has just spoken that I shall merely say a word or two in addition.

The only doubts that I have felt in this case have arisen from these circumstances. In the first place the case framed by the county court judge was obviously not intended to raise the questions which have been mainly discussed at your Lordships' bar. The only point which that learned judge seems to have had in view in delivering judgment, and in subsequently framing a case between the parties, was whether every contract between a railway company and a trader which exempts the railway company from the consequences of the default or negligence of their servants, is necessarily an illegal contract. The learned judge in his opinion, to the terms of which I need not particularly advert,

(1) 3 H. & C. 337, 342.

plainly drew from the case of *Peek* v. *North Staffordshire Railway Company* (1) what I consider to be an erroneous inference, namely, that it had been held by the House that such a condition could in no circumstances be inserted in a written contract between the parties without rendering that contract or condition null and void under the statute of 17 & 18 Vict.

The other circumstance which to some extent weighed upon my mind was the fact that the three learned judges of the Appeal Court were unanimously of opinion, upon quite a different ground, that this was an illegal condition. Shortly stated, the reasons for which I differ from those learned judges are these. I am satisfied in point of fact that the railway company, the appellants, are offering to carry at a reasonable rate with all the liabilities of common carriers; but they also, on condition of being relieved of these liabilities, offer to carry goods of the same class at a lower rate. Now it might be that the special rate offered was so much lower than the ordinary rate, for which they propose to carry as common carriers, as to make the latter a prohibitory rate that nobody would resort to, and in that case the lower might fairly be represented as a compulsory rate. But I can find nothing of that kind here. Primâ facie I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate. It may be shewn to be, in certain circumstances, unreasonable, but I think the à priori presumption is in favour of its reasonableness; and here there is evidence from the mouth of one of the parties, the respondent himself, to the effect that the rate is, by some traders, dealers in fish, acted upon.

Then as regards the special rate, I am not prepared to adopt the view which seems to have been taken by the learned judges of the Appeal Court, that whenever the lower rate without liability on the part of the company is such as to induce the bulk of the traders to prefer it to the ordinary rate with liability on the part of the company, the conditions attached to the lower rate must necessarily be illegal and void. That does not appear to me to be a reasonable construction of the words of the statute, "just and reasonable condition." It does not appear to me to be warranted by the judgment of this House in *Peek* v. *North Staffordshire*

(1) 10 H. L. C. 473.

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Railway Company (1). That case authoritatively decides, upon the statute, these three points—in the first place, that a condition of this kind must be in writing in order to bind the trader; in the second place, that it must be proved to the satisfaction of the Court to be a reasonable condition; and, in the third place, that the onus of shewing that it is a reasonable condition rests upon the railway company who allege it.

But the question as to what constitutes a reasonable condition is a question of fact; and not a question of law, and must be judged of according to the circumstances of each case. No doubt there are many very valuable suggestions in the case of *Peek* v. *North Staffordshire Railway Company* (1). But we are not dealing with a case in its circumstances similar to that, because it was there held that the company had charged a high rate as common carriers, not for the honest and bonâ fide purpose of giving an alternative to the trader, but practically with the view of giving no alternative and compelling him to adopt the one rate in preference to the other. I cannot see in the present case the least trace of that compulsion. I cannot find anything in the character and facts of this case to suggest to my mind that the condition is unreasonable. On the contrary, it appears to me to be reasonable; and therefore I have come to the conclusion that I should not be giving effect to the terms of the statute if I did not concur in the proposal to reverse the judgment of the Court below and to return to that of the Queen's Bench Division.

LORD BRAMWELL:—

My Lords, the case of *Peek* v. *North Staffordshire Railway Company* (1) was decided twenty years ago. At the time it was decided, and from thence continuously until now, I have thought it was wrongly decided, as I know it was contrary to the intention of the framers of the Act; and this case confirms me in that opinion. For here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business. And although that case has been in existence for twenty years, and has been

(1) 10 H. L. C. 473.

acted upon in Courts of Law, if it were within my competency to overrule it I would do so, because it is impossible to say that people have regulated their contracts in reference to it: they have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts, and having had the benefit of them they have turned round and have sought to avoid them.

Now I should not like to say that in this case the plaintiff was doing a thing which he knew he ought not to do. In all probability he has not the slightest notion in the world of what are the merits of the question that has been argued before us; but it stands confessedly that he has put £20 into his pocket by virtue of the contract, and he is now seeking to avoid it as an unjust and unreasonable one, yet keeping the £20. However, we are bound by the case that I have mentioned, and consequently we must say whether or not this contract is just and reasonable. Now I will not say that it is impossible that a contract can be unjust and unreasonable where both the parties who have entered into it have fully understood it. Nay, I would go further, and would say that I could understand, if, for instance, where a company were entitled to charge £100 for the carriage of a thing they took off 5*s.* upon the footing of their being exempted from all responsibility, that peradventure a man who had entered into that contract with them might say, "No, I have discovered that that 5*s.* which you have let me off is not an equivalent, nor anything like an equivalent for the loss which I sustain by your getting rid of your responsibility." I think such a state of things as that may be possible. I will not say it is not, though I should listen reluctantly to the fishmonger saying "I did not ask for a sufficient abatement." However, putting that as an illustration without putting further ones, I am not prepared at this moment to say that it is an impossibility that a contract knowingly and voluntarily entered into by two parties could be unjust and unreasonable. If it is not voluntarily entered into, that is a very different thing. But, for my own part, I am prepared to hold that unless some evidence is given to shew that a contract voluntarily entered into by two parties is unjust and

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unreasonable, it ought to be taken that that contract is a just and a reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable. First of all, its justice and reasonableness are primâ facie proved against him by his being a party to it; and if he means to say that what he agreed to is unjust and unreasonable, he must shew that it is so. I am prepared to hold that. In this particular case, that it is just and reasonable is to my mind beyond the slightest doubt, looking at the profit which the plaintiff has made by it. And when it is said, "Why, what an unreasonable thing it is that you should exempt yourselves" (as I own I think this agreement does) "from all responsibility even for the wilful default or wilful act of your own servants," I deny that there is anything necessarily unreasonable in it. I say that any man who wants to make out that it is unreasonable must prove it. I can perfectly understand (as I put in the course of the argument) a man going to a railway company and saying, "Now I deal with you; you carry fish for me; we often fall out, we have disputes; sometimes the fish is late, sometimes it is injured; sometimes it is your fault, sometimes it is not; we get into trouble and into litigation with each other; if you will make me an abatement of five per cent.," or ten per cent., or twenty per cent., or whatever he thinks fit to ask and they to agree to, "I will undertake to hold you not responsible even if the fish is spoilt or stolen by your own servants." I can understand that to be a perfectly reasonable proposal for him to make and for the company to accept. It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not. If it is a question it is one of fact; and evidence should be given to shew that the fishmonger and carrier did not understand their business but made an unjust and unreasonable contract. However, so it is, and I repeat that I am for my own part prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a

reasonable agreement, and that I should require the strongest possible evidence, or something more even than a possibility, to shew me that that was an unreasonable agreement.

Now in my opinion this was a voluntary agreement. That is the question which we have to consider, and the fact that there was an alternative is only of importance as shewing that the agreement was voluntary; because if there is no alternative then although the agreement is come to in terms, yet in truth in a sense it is no agreement between the parties, because there is a compulsion on one of them to enter into it. Therefore it becomes of importance to see whether there was an alternative, for the purpose of seeing whether the agreement was a voluntary one. Now there was most obviously an alternative. The plaintiff might have sent his fish, if he had liked, paying 20 per cent. more than he did; that is to say, paying £100 where he paid £80. If he had liked he might have sent his fish paying in that ratio with liability in the carrier; or he might have sent it upon the terms upon which he did send it, and he chose the latter.

Really it is difficult for me to express the opinion which I entertain upon this question with a sufficient appearance of the respect I have for the opinion of those who have thought differently, namely, the learned judges in the Court below. They seem to say that there is no option because the terms are too good—the benefit given to the plaintiff is too great; that if a less benefit were given to him and to all the other senders of fish, if instead of 20 per cent. being taken off the price it were 10, or peradventure 5 (for 10 might be too much for aught I know), then indeed there would be an option; but as it is, it is such an irresistible temptation to him I suppose, it is so good a thing for him, that he has no choice but to take it. The argument comes to this: the allowance is so just and reasonable to *all* fish dealers that it is unjust and unreasonable to *each* of them. Well, one has heard a great many discussions about free will, but I protest that this is a novelty—I never heard anything like it before—it is the most extraordinary proposition that I ever heard in my life. The assumption that he is obliged to do it because he cannot otherwise compete with his fellow-fishmongers is the most gratuitous one that was ever invented in this

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world. He says, that he has put £20 into his pocket; but suppose that his profit was twenty times £20, or two hundred times £20 in the course of the year, which for aught we know it might be, there is not the slightest proof that it is not so—it is said that because he has put £20 into his pocket we are to infer that he could not carry on his trade unless he could put that £20 into his pocket, and therefore that the thing is of a compulsory nature, and that he has no option, no choice, and that consequently his agreement is not voluntary. I repeat that I really do not understand how such a conclusion could have been come to, except by some generous feeling that railway companies ought to be kept in order for the benefit of fishmongers.

Now just let me ask this question—"Just and reasonable"—Is it just? If it is not, it is unjust. Is it unjust? Will any human being say that this man has been unjustly treated? Well, but justice alone is not sufficient; you must not only be just, but you must be reasonable, which, by the way, rather imports that you may be one without the other. I should think that that was an extremely difficult thing. However, if it is just, is it reasonable? Why its very justice shews its reasonableness.

I must say that I really do think this is about the plainest case that ever came before your Lordships' house.

LORD FITZGERALD:—

My Lords, I concur. The question for our consideration is whether the conditions expressed in the special contract signed by the plaintiff are just and reasonable. Such a question always involves matters of fact as well as legal considerations, and probably was made a question for judicial decision in order to afford some protection to parties dealing with carriers and public companies against injustice and oppression, and insure for them freedom of contract. The true construction of the special contract has been raised before us, and I think that its conditions must be read according to the ordinary and natural meaning of the language used, and that your Lordships would not be justified in importing or implying any limitation not expressed. Read in that light the language is large enough to protect the defendants from the negligent conduct of their servants, but I am not

inclined to go further. If your Lordships were to interpret it as protecting the defendants from wilful misconduct, then a large and important question would arise for determination, namely, whether a contract, which wholly relieved the company from liability for loss or damage and exonerated them from all the obligations of duty, was not in itself unjust and unreasonable and contrary to the policy of the law.

Assuming, then, that the special contract, if it stood alone and without more, might have been unreasonable, it may become fair and reasonable if a proper alternative was offered to the plaintiff. The alternative in my judgment was a fair and reasonable one. It was to carry at a rate which we must deem to have been reasonable as it was less than the parliamentary rate, and subject to all the liabilities of carriers at common law. The defendants at the same time offered to carry at a reduction of 20 per cent. if relieved from certain common law liabilities.

The plaintiff deliberately rejected the first and accepted the second—and signed a contract to that effect. He now asks to be relieved from it, alleging that it was unjust as imposing on him unreasonable conditions, and that in effect he was coerced to adopt it, having no option. The Court of Appeal seems to have been of that opinion, and two of the Lord Justices seem to rest their decision on the ground that the plaintiff was not a free agent.

Thus Baggallay L.J., after giving his impression on what I cannot help thinking was the main question, is represented to have said (1) :—"But I do not think it necessary to express a definite opinion upon that point now; because it appears to me that, having regard to the circumstances of this case, there really was no option as between the two modes of carriage which the plaintiff could adopt. I think, therefore, that this appeal must be allowed." And Lindley L.J., thus expresses his final opinion :—"It follows from the foregoing reasoning that in my opinion such a contract as the one before us might be reasonable under other circumstances; and I cannot go to the length of my brothers Baggallay and Brett and say that such a contract must be

(1) These quotations are from the shorthand notes printed in the papers before the House.

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unreasonable in all cases. I should consider it reasonable in all cases in which the customer was not practically compelled to adopt the lower rate. Under such circumstances I should concur with Lords Blackburn and Bramwell, and with the decision in *Simons* v. *Great Western Railway Company* (1)."

In that view I am unable to follow the Lords Justices, but though differing from them with hesitation I prefer the opinion of Mathew J. in the Divisional Court, when he says: "It is perfectly clear here that the customer was free if he chose to have gone to the company and demanded that they should have carried his goods as common carriers. In that state of things they would be liable in the ordinary way for all the risks of the carriage. But the company in lieu of that contract which rendered them liable for all the risks of the journey proposed to the customer the terms which I have just read, and in consideration of his accepting those terms they proposed to carry his goods at *one-fifth less* than the ordinary rate; and the customer agrees to those terms." Why should the plaintiff be relieved from the contract he has deliberately accepted? There was full and ample consideration, there is an absence of any fraud, and he has not been overreached. He elected to send his goods at the lower rate—the alternative offered to him was fair, and I can discover no ground on which we can treat this special contract as a fraud on the statute or relieve the plaintiff from its consequences.

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to repay (according to the undertaking given) the costs in the Court below; and to pay the appellants their costs in the Court of Appeal and their costs of this appeal; cause remitted to the Queen's Bench Division.

Lords' Journals 23rd July 1883.

Solicitors for appellants: *Cunliffe, Beaumont & Davenport*, for *R. Lingard-Monk*, Manchester.

Solicitors for respondent: *Rollit & Sons*, for *Rollit & Sons*, Hull.

(1) 18 C. B. 805.

[PRIVY COUNCIL.]

THE CANADA SOUTHERN RAILWAY COMPANY . . . . . } DEFENDANT;

AND

THE INTERNATIONAL BRIDGE COMPANY . . . . . } PLAINTIFF.

J. C.*
1883
July 4.

THE CANADA SOUTHERN RAILWAY COMPANY . . . . . } PLAINTIFF;

AND

THE INTERNATIONAL BRIDGE COMPANY . . . . . }
THE GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } DEFENDANTS.
THE ATTORNEY-GENERAL OF ONTARIO . . . . . }

ON APPEAL FROM THE COURT OF APPEAL, PROVINCE OF ONTARIO, DOMINION OF CANADA.

Construction—Canadian Act, 20 *Vict.* c. 227, s. 16—22 *Vict.* c. 124—*Power to levy Tolls—Reasonableness of Charges.*

Held, that the International Bridge Company was under Canadian Act 20 Vict. c. 227, s. 16, entrusted with a general and unqualified power of making bye-laws and regulations as to the use of its bridge and the terms on which it should be used in point of payment; and that there is nothing in sect. 2 of the amending Act (22 Vict. c. 124), when read and construed together with the principal Act, which cuts down that power as to the regulation of the use of the bridge and as to the terms on which it may be used by railway trains.

As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged.

BOTH appeals were from decrees of the Court of Appeal (March 24, 1881) affirming two decrees of the Court of Chancery (August 24, 1880).

By the decree in the first appeal it was declared that the

* *Present*:—THE LORD CHANCELLOR (EARL OF SELBORNE), SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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respondent International Bridge Company was entitled to certain tolls claimed by it from the appellants for the use by them of the respondent's bridge, and consequential relief.

By the decree in the second appeal the appellants' suit was dismissed, in which they had prayed that they might be declared to be entitled to equal rights and privileges with the Grand Trunk Railway Company or any other railway company in the passage by their trains of the bridge belonging to the International Bridge Company, and without any discrimination or compensation, or otherwise, and subject to such reasonable terms and conditions as might be determined, and for consequential relief.

The appellant is a corporation under the laws of the Dominion of Canada. Its railway is adjacent to the Canadian terminus of the International Bridge crossing the river Niagara. It also works a line of railway from such terminus to Lake Ontario. The International Bridge has one of its termini in the Province of Ontario and the other in the State of New York. The bridge and approaches are owned and maintained by the International Bridge Company, which is incorporated under the laws of the Dominion of Canada and also under the laws of the State of New York, and an agreement made thereunder: see an Act of the State of New York passed on the 17th of April, 1857, intituled "An Act to incorporate the International Bridge Company," and an Act of the Legislature of the former province of Canada, 20 Vict. c. 227. See further an Act of the State of New York, passed May 4, 1869, and Canadian Act, 32 & 33 Vict. c. 65, in virtue whereof an agreement or act of consolidation, dated the 18th of May, 1870, was entered into from which the International Bridge Company derived its origin.

The questions decided in this appeal are, first, as to the construction of the Acts of the Canadian Legislature, viz. 20 Vict. c. 227, sects. 14, 16, and 22 Vict. c. 124 (which amended the former Act), sect. 2, as to the right to demand tolls; second, whether the tolls are reasonable or are shewn to be unreasonable.

The sections are sufficiently set forth in the judgment of their Lordships.

By the decree in favour of the International Bridge Company from which the first appeal was made, it was ordered and

declared: (1.) That the appellants are liable to pay to the respondents tolls for the use of the respondents' bridge at the rate settled by the directors of the respondents' company, namely, for each passenger carried in a railway car ten cents, for each freight car whether box or platform containing merchandize of any description one dollar, for each freight car whether box or platform not loaded fifty cents, for each locomotive not running a train or connected with trains passing across the bridge seven dollars and fifty cents, for each new passenger car two dollars and fifty cents, for each new freight car box or platform one dollar and fifty cents, for each conductor's van one dollar. No charge for engines hauling trains across the bridge or going to fetch a train in either direction provided such engines are bonâ fide going for the purpose mentioned, no charge for passenger cars carrying passengers and for which the rate of ten cents is to apply, but for every other car on a passenger train such as baggage, post office &c. one dollar whether full or empty, less a rebate on the basis of twenty-five per cent. on any sum above fifty-five thousand dollars and less than one hundred thousand dollars in each period of twelve months, and a rebate of thirty-three per cent. on any sum over one hundred thousand dollars in each period of twelve months. (2.) That it be referred to the Master of the Chancery Court to take an account of the amount due by the appellants to the respondents in respect of their user of the said bridge from the 31st day of October, 1877, to the 31st day of December, 1878, having regard to the declaration aforesaid, with interest. (3.) That the appellants do pay to the respondents the amount found due by the said master for tolls and interest forthwith after the said master shall have made his report. (4.) That the appellants do pay to the respondent their costs of the suit in the Chancery Court forthwith after taxation thereof.

Cohen, Q.C., and *Davey*, Q.C. (*Pollard* with them), for the appellant company, contended that the tolls demanded by the respondent corporation were illegal and excessive. No tolls or imposts could be legally imposed in respect of the appellants' user of the bridge and its approaches other than those prescribed

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by Canadian Statute 22 Vict. c. 124, s. 2. Reference was also made to sect. 16 of the New York Act of the 17th of April, 1857. If those two sections are read together, sect. 2, being the later one in point of time, must be taken to limit the power as to tolls both in respect of railway as well as other traffic, and also to define maximum rates as well as the articles which are the proper subject of tolls. As to the proper construction of Acts giving power to corporations to collect tolls, see *Pryce* v. *Monmouthshire Canal and Railway Companies* (1); *Gildart* v. *Gladstone* (2); *Stourbridge Canal* v. *Wheeley* (3); *Stockton and Darlington Railway Company* v. *Barrett* (4). It was further contended that the tolls claimed were not at reasonable rates, having regard to the capital expenditure on the bridge and the returns.

Blake, Q.C., of the Canadian bar, and *Ernest Page*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (EARL OF SELBORNE):—

Their Lordships have considered the arguments addressed to them by the learned Counsel for the appellants, and they do not think it necessary to hear further argument upon the case, being of opinion that the decree of the Court of Appeal appealed from is correct.

Their Lordships think that no error has been committed by the appellants in their statement of the substantial questions in their printed case. The first two of the questions there stated go to the construction of certain Acts of the Canadian Legislature; the next two go to the reasonableness of the tolls or imposts that may be demanded: and the last, about unfair discrimination, has been given up. In substance, therefore, the questions resolve themselves into two: what is the construction of the Acts as to the right to demand tolls, and whether the tolls are reasonable or are shewn to be unreasonable.

Their Lordships might content themselves with stating their agreement in the reasons given by the learned Judge in the

(1) 4 App. Cas. 197, 203.
(2) 11 East, 675.
(3) 2 B. & A. 792.
(4) 7 Man. & G. 870.

Court of Appeal upon the assumption (which, for the purposes of that decision, that learned Judge made, without deciding the point) that the criteria of reasonableness which have been suggested in the argument of the appellants might, under some circumstances, be accepted; but it will, doubtless, be more satisfactory to the parties that the way in which the case presents itself to their Lordships themselves should be succinctly stated.

First, with regard to the Acts: There are two Acts of the Canadian Legislature, and if they stood alone, and upon the assumption, which it is not at all clear we ought to make, that for the purpose of determining their construction the New York Acts ought not to be looked at at all, we should come to the conclusion that has been arrived at in the Court below. It is to be observed that those two Acts are to be read together by the express provision of the 7th and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act.

Two clauses in the earlier Act, and only two, seem to their Lordships to be really important, the 14th and the 16th. The 14th clause shews distinctly that from the beginning it was intended that the bridge should be for a double purpose, as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains, and those two purposes are distinguished. It was to be adapted for both. For whatever reason, it may be through some inadvertence, it may be because it was thought expedient to put the company in a position which would direct its energies in the first instance to the completion of the undertaking for the passage of railway trains, there was in that first Act no express provision as to regulations, bye-laws, or rules in relation to the use of the bridge for the passage of persons on foot and in carriages and otherwise, not being by railway train; but there is a clause, the 16th, expressly applicable to the regulation of the use by railway trains:—

"Whenever the said bridge is so completed as to admit of the

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passage of railway trains, the said company may erect such gates and fixtures to guard the entrance of such trains upon the bridge as the said directors may deem proper, and may make such bye-laws, rules, and regulations, not inconsistent with the provisions of this Act, in relation to the use of the said bridge, its machinery, appurtenances, and approaches, by railway companies, their trains and carriages, as the directors may think proper, but no discrimination shall be made by the said directors in favour of or against any one or more railway companies in relation to the approaches or the passage of the said bridge or the use of its machinery."

It has not been contended at the bar, and their Lordships think it would have been impossible to contend with success, that, standing upon that Act alone, which makes no provision anywhere except in that 16th section, and in that way, for any charges to be made for the use of the bridge, the Canadian Legislature meant that this undertaking was to be executed at the cost of the undertakers, and that the public were to be at liberty to use the bridge when made without paying anything for it, and that the discrimination which was forbidden had reference to facilities for accommodation as distinguished from charges. Nothing could be more unreasonable than such a construction, and the only mode of reconciling it with the purposes of the Canadian Legislature suggested by the counsel for the appellants was this, that they may have thought the question of charges a matter to be postponed. But when we find them legislating for regulations as to the use when the bridge was completed so as to admit of the passage of railway trains, it cannot be supposed that that would not be the proper time to determine the question of charge, and in reality the natural meaning of the words comprehends it. Are not byelaws, rules, and regulations which say that the bridge shall be used upon certain terms of payment,—assuming for a moment that there is nothing to make the partcular terms unlawful,—properly within such words? That would really not be a question seriously arguable, and at their Lordships' bar it has not been argued.

This was a very important point to arrive at, because it follows that when the first Act was passed the Legislature thought fit to entrust the company with a general and unqualified power of

making byelaws and regulations as to the use of the bridge and the terms on which it should be used in point of payment, and did not then, at all events, think it expedient to fix any tariff or to impose any limit other than such, if any, as might be implied by law, namely, that the charges should not be unreasonable.

The only remaining question is whether there has been anything done to take away or to cut down that power as to the regulation of the use of the bridge, and the terms on which it might be used, by railway trains, by the latter Act. Now it is, their Lordships think, reasonably plain that the 2nd section of the latter Act was passed to supply the omission which, as already noticed, is found in the first Act, whether that omission was inadvertent or due to any purpose of any kind. It is clear that the original Act contemplated not only that the bridge should be so completed as to admit of the passage of railway trains, but that it should be so completed as to admit of the passage of persons on foot and in carriages and otherwise; and whether there was a desire that the one thing should be done before the other or not,—whether the view of the Legislature was the same when both Acts were passed, or at all varied in that respect,—is really not material. One thing is quite certain, and open to no controversy whatever; and that is, that this 2nd section of the amending Act does supply the omission in the original Act, and does provide for the regulation of the passage of persons on foot and in carriages and otherwise, not being by railway trains, and for the charges to be made in that respect, which the first Act had not done. The question is whether it does anything more. It appears to their Lordships, as it appears to the Court below, that it certainly had that purpose, and that alone. We are to read the two Acts, as far as we can, together, and doing so, whatever may be the meaning of the word "trains" in this 2nd section of the amending Act, it is impossible not to observe the distinction between the words "Whenever the said bridge is so completed as to admit of the passage of railway trains" on the one hand, and the words "Whenever the bridge authorized by the said Act shall be complete for the passage of ordinary trains and carriages" on the other. Are "ordinary trains" in the amending Act the same thing with "railway trains" expressly provided for in the original Act? Primâ facie, not. Ordinary carriages, beyond all

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question, are not. When we come to the sequel, and consider what is to be done, the first thing we find is that "the company may erect toll-gates and collect rates of toll." Obviously that has reference to the proper mode of dealing with persons on foot and in carriages other than railway carriages. Whatever ought to be charged for railway trains would not, naturally or ordinarily, be collected at toll-gates or in any such manner. But when we go on, we find that every single word in the clause, with the exception of the words "for each other passenger the sum of 25 cents," and the concluding words as to live stock, is sensible, and is only sensible with regard to ordinary carriages drawn by other means than locomotive engines and not upon railways. The words which might by possibility have a larger sense, being found in association with those which have this limited sense, and in a clause of this nature supplying the defect which is found in the earlier Act, ought to be understood, from the association in which they are found, to have reference to things ejusdem generis, and not otherwise. In that way they are perfectly intelligible, because, as foot passengers and passengers riding horses or actually travelling in carriages only have been mentioned before, the words "for each other passenger" would include persons either travelling, if it was then possible, upon velocipedes or bicycles, or by any other means of that kind, or passengers riding upon other animals not properly described as horses. Asses are certainly not horses, and are doubtless in use in Canada as well as other places. It is clear, therefore, that those words are sensible without supposing them to have reference to railway passengers; and as railway passengers had been provided for by the earlier Act, it is not reasonable to suppose that the provision before made for railway passengers, or rather for railway traffic, was intended to be altered by these words in such a context.

The same thing is to be observed upon what follows about live stock. The only expression which could be applicable in any sense to railway traffic are the words "in cars;" but "in droves or in cars," from the association, also shew plainly that railway traffic was not, at all events, exclusively in view. If it had been in view at all it would have been expressly mentioned, and the words "in cars" are not only possibly applicable to the conveyance of horses under some circumstances in some description of

vehicle, but here their Lordships think it is quite legitimate to refer to the American statute, not to construe this, but to shew the usage of that country to which both statutes relate, one on one side of the border and the other on the other; because the words "in cars" occurring in the American statute plainly shew that, as a matter of fact, such a mode of conveying horses and other animals was according to the usage of the country to be provided for. There is, therefore, no ground whatever for supposing that it was meant by this 2nd section to qualify or repeal, or alter or limit in any way whatever, the latitude of the power as to the regulations of railway traffic which had been expressly given by the earlier Act.

That being so, the question of reasonableness only remains. Their Lordships have been struck with one thing, and that is that the two arguments which have been used, the one that the whole tariff is laid down by the 2nd section of the amending Act, and the other that the actual tariff is unreasonable, are not very easy to reconcile with each other; because it is clear that if the words "for each other passenger the sum of 25 cents" did apply to railway passengers, it would authorize taking a sum exceeding very much what is taken under the actual tariff, which is only 10 cents. The truth is, that the whole argument which has been urged as to the test of reasonableness is one which it would be excessively difficult to apply to the ordinary traffic, otherwise than by railway, under the amending Act, where all the fixed charges may be taken, and manifestly without the slightest reference whatsoever to the amount of dividend which might be obtained by the shareholders in a company. If there had been an express regulation of the railway traffic, fixing maximum tolls to be taken, ejusdem generis with that which we find as to the other traffic, it would, ex necessitate, have excluded this whole argument as to the principle on which the reasonableness of charges of this kind ought to be determined.

It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be

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imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked Counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a Court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned Judge in the Court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterise that argument as anything less than preposterous.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Court of Appeal of the Province of Ontario should be affirmed, and both these appeals dismissed with costs.

Solicitors for appellant company: *Freshfields & Williams.*
Solicitors for respondent companies: *Batten, Proffit, & Scott.*

[PRIVY COUNCIL.]

EDWARD MACDONALD . . . . . DEFENDANT;

AND

GEORGE WHITFIELD . . . . . PLAINTIFF.

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June 13, 14;
July 11.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Promissory Notes—Indorsement as co-Sureties—Liability of Indorsers to equal Contribution inter se.

The liabilities inter se of successive indorsers of a bill or note must in the absence of all evidence to the contrary be determined according to the ordinary principles of the law-merchant, whereby a prior indorser must indemnify a subsequent one.

But the whole circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it either as makers or indorsers; and reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them.

Where the directors of a company mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company:—

Held, reversing the judgment of the Court below, that they were entitled and liable to equal contribution inter se, and were not liable to indemnify each other successively according to the priority of their indorsements.

Reynolds v. *Wheeler* (10 C. B. (N.S.) 561) approved; *Steele* v. *McKinlay* (5 App. Cas. 754) distinguished.

According to the Civil Code of Lower Canada (arts. 2340 and 2346) the law of England, in force on the 30th of May, 1849, is applicable to the question raised in this appeal.

APPEAL from a judgment of the Court of Queen's Bench (Sept. 23, 1881) reversing a judgment of the Superior Court held at St. John's, in the district of Iberville (Sept. 1, 1879), and condemning the appellant to indemnify the respondent in respect of a decree obtained against him by the Merchants' Bank of Canada

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

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on three promissory notes. The notes had been made by the St. John's Stone Chinaware Company, payable to the order of the appellant, and indorsed by the appellant and respondent in succession.

The facts of the case appear in the judgment of their Lordships.

Matthews, Q.C., and *Fullarton*, for the appellant, contended that the respondent had framed his action upon an allegation of actual indorsement and delivery by the appellant to him. The evidence did not sustain it. The respondent should prove that the notes had been indorsed to him with the intent that he should be the holder, and the appellant liable to him thereon. Otherwise there was no contract between appellant and respondent by the law-merchant; and no contract to undertake successive liabilities as between themselves and the other directors: see *Denton* v. *Peters* (1). The footing upon which the indorsements by the directors took place clearly appears upon the correspondence with the bank. From that correspondence and by necessary inference from all the facts and surrounding circumstances it appears that the directors all agreed to become co-sureties to the bank of their company's notes, and that they indorsed the notes in pursuance of that agreement. The right of contribution inter se arises independently of contract. It accrues to each co-surety by rules of equity, and the liability so to contribute is imposed by equity independently of contract to that effect: *Dering* v. *Lord Winchelsea* (2); *Reynolds* v. *Wheeler* (3). The right and the liability arise from the intention to become co-sureties: *Whiting* v. *Burke* (4); *Gray* v. *Seckham* (5); *Wilkinson* v. *Unwin* (6); *Steele* v. *McKinlay* (7). In Canada the authorities in our favour are *Clipperton* v. *Spettigue* (8), *Cockburn* v. *Johnston* (9); while opposed to the appellant's contention are *Janson* v. *Paxton* (10) and *Fisken*

(1) Law Rep. 5 Q. B. 475.
(2) 1 W. & T. 106.
(3) 10 C. B. (N.S.) 561; 30 L. J. (C.P.) 350.
(4) Law Rep. 10 Eq. 539; Ibid. 6 Ch. 342.
(5) Law Rep. 7 Ch. 680.
(6) 7 Q. B. D. 636.
(7) 5 App. Cas. 754.
(8) 15 Grant's Ch. Rep. (U.C.) 269.
(9) 15 Grant, 577.
(10) 23 C. P. (U.C.) 439.

v. *Meehan* (1), both decided by a majority of the judges on grounds distinguishable from this case as regards the circumstances connected with the making of the notes. As regards the right of action reference was made to the Civil Code of Lower Canada, arts. 1235, 1955, and 1935.

Hugh Cowie, Q.C., and *M. D. Chalmers*, for the respondent, contended that he was not a co-surety with the appellant or with any of the other directors. Upon the instruments they had all signed in a manner which imported successive liability; they had not indorsed jointly or in any way which distinguished it from the ordinary form. The Court below relied not merely upon the absence of any written agreement between the directors, but also on the presumptions arising out of the circumstances of the case. There was nothing to displace the inference from the form of the indorsements that the law-merchant applied to the transaction. The strongest evidence was necessary to displace such inference. The co-suretyship of the indorsees was not to be inferred from the indorsements being for the accommodation of the maker. By art. 1935 of the Civil Code suretyship must be express and not presumed. As regards *Dering* v. *Lord Winchelsea* (2), see *Craythorn* v. *Swinburne* (3), where Lord Eldon explains it in a manner favourable to the respondent. In *Whiting* v. *Burke* (4) is a cŭrious misquotation of the passage from 14 Vesey. *Reynolds* v. *Wheeler* (5) is the only case of the kind in the reports; it does not appear to have been commented upon in other cases, though it is mentioned in the text-books. Reference was made to *Janson* v. *Paxton* (6); *McDonald* v. *M'Gruder* (7); *Suse* v. *Pompe* (8); *Strong* v. *Foster* (9); *Wilkinson* v. *Unwin* (10). In America the rule is clear that the first accommodation indorser is liable to the second accommodation indorser unless there is an express agreement to the contrary: *McCarty* v. *Roots* (11); *Shaw* v. *Knox* (12);

(1) 40 Q. B. (U.C.) 146.
(2) 1 W. & T. 106.
(3) 14 Ves. 160, 164.
(4) Law Rep. 10 Eq. 544.
(5) 10 C. B. (N.S.) 561.
(6) 23 C. P. (U.C.) 439.
(7) 3 Peters, 470; 8 Curteis, 491.
(8) 30 L. J. (C.P.) 75, 80.
(9) 17 C. B. 201.
(10) 7 Q. B. D. 636.
(11) 21 Howard, 432.
(12) 98 Massachussets, 214.

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Kirschner v. *Conklin* (1). As regards the respondent's right to recover the costs of the action brought against him by the bank: see *Stratton* v. *Mathews* (2).

Fullarton replied.

1883 *July* 11.

The judgment of their Lordships was delivered by

LORD WATSON:—

Edward Macdonald and George Whitfield, who are respectively appellant and respondent in this appeal, were in the year 1875 directors of a trading corporation known as the St. John's Stone Chinaware Company, which carried on business at St. John's in the district of Iberville and province of Quebec. At that time the concern was not in a very prosperous condition, and in the month of July, 1875, the balance due by the company in its account current with the Merchants' Bank of Canada was upwards of $17,000. The appellant was president and chairman of the board of directors; and he had indorsed the company's promissory notes, for its accommodation, to the Merchants' Bank to the amount of $65,000. It appears that he had also given his personal guarantee to the bank for the overdrafts of the company upon its account current to the extent of $10,000.

In July, 1875, the company, being in want of funds, applied to the bank, through the appellant, for further credit; and on the 24th of that month the agent of the bank of St. John's sent a written answer to the application, addressed to the late Mr. Lavicount, the secretary of the company, in these terms:—

"Dear Sir,—Respecting your president's application to the bank for further extension of your credit, I have the pleasure to inform you that you have been allowed an extension of four or five thousand dollars in case of need. The bank, however, requires that the present advances, as they mature, be secured by the personal guarantee of your directors, should renewals be required, which could be done by their indorsation of the notes. Your account current is now overdrawn seventeen thousand six

(1) 40 Connecticut, 81. (2) 3 Ex. 48.

hundred and fourteen dollars and fifty-four cents; and by giving me the company's note, indorsed as required, for 8500 dollars, you will reduce your overdrawn account, leaving a balance of 700 dollars of above loan.

"I enclose a letter of guarantee along with a note, for signature by your directors, as required by the bank, to take the place of Mr. Edward Macdonald's personal security for the like amount."

Along with this communication there were sent to the secretary of the company the letter of guarantee, and also the note therein mentioned.

The letter in question, which was dated the 24th of July, 1875, and addressed to the agent of the bank, was expressed as follows:—

"Dear Sir,—In consideration of the Merchants' Bank of Canada allowing the St. John's Stone Chinaware Company to overdraw their account to the extent of ten thousand dollars, we herewith deposit with yon, as collateral security for the due payment of such overdraft, the demand note of the company, indorsed by the following directors individually . . . . And we hold ourselves liable without prejudice to the ordinary legal remedies.—Subscribe ourselves, your obedient servants."

The note which accompanied the foregoing form of letter for signature by the directors was a promissory note by the company for $10,000, payable on demand to the order of the appellant, at the office of the Merchants' Bank of Canada in St. John's.

Having regard to the pecuniary relations then subsisting between the company and the bank, the arrangements thus proposed by the latter are sufficiently intelligible. The bank had made large advances by discounting, or in other words purchasing, the paper of the company indorsed for its accommodation by the appellant, and had also advanced upwards of $17,000 on current account, which was only secured to the extent of $10,000 by the personal guarantee of the appellant. In these circumstances the bank was willing to make a further advance of from $4000 to $5000, provided the company complied with these three conditions:—In the first place, advances upon current notes

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which had been discounted by the bank were, in the event of renewals being required at maturity, to be secured by the personal guarantee of the directors of the company, such guarantee to be given by their indorsation of the renewal notes. In the second place, the note of the company for $8500 duly indorsed by the directors as aforesaid was to be delivered to the bank in payment and extinction pro tanto of the advances on current account, so as to reduce the debit balance of the company to nine thousand odd dollars. And, in the third place, the demand note for $10,000, when duly signed and indorsed by the directors, was to be deposited with the bank as a collateral security for overdrafts on account current, and was to be substituted for the appellant's personal security for the like amount.

No mention is made in the bank's letter of the manner in which the additional advance or extended credit of $4000 to $5000 was to be allowed to the company. It is obvious, however, that the bank was not prepared and did not agree to give the extended credit without security; and also that the result of carrying out the conditions upon which it was to be given would be to reduce the balance due on current account about $700 only below the amount of the demand note covering that account. It, therefore, seems matter of reasonable inference that the additional advance was to be made by the bank discounting the promissory note or notes of the company, duly indorsed by its directors.

On the 5th of August, 1875, the directors of the St. John's Stone Chinaware Company met for the purpose of considering the answer returned by the bank to the application made through the appellant, for an extension of the company's credit. At that meeting all the directors of the company, five in number, were present, viz., the appellant, the respondent, and Messrs. Marler, Coote, and Macpherson. The minute of the meeting of the 5th of August, 1875, as entered in the minute-book of the company, bears that "the letter of the agent of the Merchants' Bank of the 24th ultimo was submitted, and the directors agreed to give the personal indorsation asked for by the bank, and the secretary was instructed to have the said notes drawn out, signed as required, and handed over to the Merchants' Bank."

In pursuance of that resolution the secretary of the company

drew out two notes for $8500 and $4500 respectively, which he signed as promissor on behalf of the company, the name of the appellant being inserted as payee, just as it had been in the demand note for $10,000 sent by the bank for signature and indorsation. Mr. Marler, one of the five directors of the company, was also the manager of the Merchants' Bank of Canada in St. John's, and was precluded from signing any of these promissory notes by the regulations of the bank. All the other directors indorsed the demand note for $10,000 (after it had been signed by the secretary for the company) in the following order, (1) the appellant; (2) the respondent; (3) Mr. Coote; (4) Mr. Macpherson. It does not clearly appear whether Mr. Macpherson did or did not become a party to the two notes for $8500 and $4500; but these were certainly indorsed by the other three directors in the same order in which their signatures were put on the $10,000 note. Neither does it appear at what dates these two bills for $8500 and $4500 were made payable; but it appears to their Lordships to be established that they were new discount bills, and that they were renewed on more than one subsequent occasion, the last renewal of the first of these notes having been made on the 21st of March, and the last renewal of the second upon the 26th of March in the year 1877. These renewal bills were not signed by Macpherson, but they were indorsed by the appellant, by Mrs. Whitfield, per procuration of her husband the respondent, and by Mr. Coote in the same order as before.

The letter of guarantee sent by the bank was subscribed by the appellant as well as by Messrs. Coote and Macpherson, and their names were inserted in the blank left for that purpose; but it was not signed by the respondent, nor was his name entered therein. When thus completed, the letter was handed to the bank along with the $10,000 demand note.

On the 27th of December, 1877, the Merchants' Bank of Canada instituted a suit against the appellant, the respondent, and Mr. Coote, in the Court of Queen's Bench for Lower Canada, for recovery of the sums then due to the bank as holder for value of the said demand note for $10,000, dated the 24th of July, 1875, and of the two renewal notes for $8500 and $4500, dated the 21st and 26th of March, 1877. The demand of the bank was

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not resisted either by the appellant or by Mr. Coote, but the respondent appeared and defended the action. After a variety of proceedings, which it is unnecessary for the purposes of this case to notice in detail, Mr. Justice Chagnon, on the 1st of September, 1879, ordained the three defendants, jointly and severally, to pay to the bank the contents of the two notes of the 21st and 26th of March, 1877; and also ordained the appellant and Mr. Coote, jointly and severally, to make payment to the bank of the contents of the demand note for $10,000.

On the 17th of January, 1878, the respondent, availing himself of the provision of article 1953 of the Civil Code, brought an action en garantie before the same Court against the appellant, concluding to have the appellant condemned to acquit and relieve him of any sum of principal and interest, for which decree might be given against him in the suit at the instance of the bank. In the declaration filed by him in that action, the respondent treated the three promissory notes in question as if they had been ordinary commercial paper. His allegations in regard to each of these notes were in substantially the same terms, and after reciting the making of the note by the company, payable to the appellant, thus proceeded :—

"Lequel billet la dite St. John's Stone Chinaware Company remit au dit défendeur Edward Macdonald, qui là et alors signa et endossa le dit billet et le remit au dit demandeur en garantie George Whitfield, qui là et alors signa et endossa le dit billet et le remit au dit Isaac Coote, qui là et alors signa et endossa le dit billet et le remit à la dite Merchants' Bank of Canada, qui en est encore porteur et propriétaire."

The plea founded by the respondent on that allegation was to the effect that the defendant,

"Étant, ainsi qu'il appert par les allégués ci-dessus, endosseur précédent et antérieur au dit demandeur en garantie, sur tous et chacun des trois billets plus haut mentionnés, est obligé et tenu en loi de rembourser, garantir et indemniser le dit demandeur en garantie de tous troubles et de toute condamnation qui pourrait intervenir contre lui, sur et à raison des dits billets, et dans et à

raison de la dite action instituée par la dite Merchants' Bank of Canada."

In this action of warranty judgment was given by Mr. Justice Chagnon on the 1st of September, 1879. The learned judge held that the evidence given by the respondent himself, with regard to the circumstances in which these notes were made and indorsed, shewed that the property of the notes was not passed by the indorsations, and that there was, in point of fact, no delivery by one indorser to another. And, inasmuch as that testimony, in his opinion, contradicted the allegations upon which the respondent's claim of indemnity was based, he dismissed the action as laid, reserving to the respondent any recourse which might be competent to him against the appellant.

An appeal was taken by the Merchants' Bank of Canada against the judgment of Mr. Justice Chagnon of the 1st of September, 1879, in so far as it absolved the respondent from liability to the bank in respect of the demand note for $10,000. The respondent also appealed against the judgment of the same date, in his action en garantie. On the 18th of June, 1881, the two actions were consolidated by an order of the Queen's Bench.

Thereafter, on the 23rd of September, 1881, the Court of Queen's Bench gave judgment in the conjoined causes. The Court, in the suit at the instance of the bank, reformed the judgment of Mr. Justice Chagnon and condemned the respondent in payment to the bank of the $10,000 demand note, with interest and costs. In the action at the respondent's instance, the Court reversed the judgment appealed from, and condemned the appellant to guarantee, acquit, and indemnify the respondent from all the condemnation in principal, interest, and costs pronounced against him by the judgment in favour of the bank, and further condemned the appellant to pay to the respondent the whole costs incurred by him in the suit at the bank's instance. The present appeal has been brought against the judgment in the action en garantie of the 22nd of September, 1881, by Edward Macdonald, the defendant in that action.

The learned judges of the Court of Queen's Bench were of opinion that the two promissory notes for $8500 and $4500, dated the 21st and 26th of March, 1877, were mere renewals of notes

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which the company had, prior to the 24th of July, 1875, discounted with the bank, upon the indorsation of the appellant; and a finding to that effect is set forth as one of the considerations on which the formal judgment of the Court proceeds. Chief Justice Dorion, who delivered the judgment of the Court, said, "the two notes of the 21st and 26th of March, 1877, are renewals of other notes which, prior to the 24th of July, 1875, were indorsed by Macdonald alone."

The learned Judges were also of opinion that the note for $8500 was the only one which the bank, by its letter of the 24th of July, 1875, required from the company, in order to cover its overdrafts upon current account; and, further, that it was the only note which the directors of the company, by their resolution embodied in the minute of the 5th of August, 1875, agreed to give, indorsed by them, to the bank. Upon this point Chief Justice Dorion, said: "It is also to be remarked that the bank merely asked the indorsement of the directors on a note for $8500, to cover the overdrawn account of the company, and that by the resolution it was only agreed to give the indorsation asked for, while the note indorsed by the directors to cover the overdrawn account is for $10,000; the resolution, therefore, does not apply to the note in question, and cannot be invoked as containing an agreement on the part of Whitfield (the respondent) to indorse this note of $10,000 as surety for the company."

The views thus expressed by the learned Chief Justice are, in the opinion of their Lordships, founded on a misconception of the true import of the written communication made by the bank to the company on the 24th of May, and of the action taken upon that communication by the directors of the company on the 5th of August, 1875. It must be borne in mind that the company required a further credit, or in other words a further advance from the bank, and as the bank had not asked for the indorsements of the directors, except as a consideration for making the required advance, it is improbable that the directors agreed to give or gave their indorsations, without making provision for the company getting, in exchange for these indorsations, the advance of $4000 to $5000 which the bank was willing to allow. If the note for $4500 which the directors then indorsed was a new note

for discount, then the company got the advance, in respect of which they were asked, and presumably agreed, to give their indorsations upon the notes required by the bank. As regards the note for $8500, the suggestion that the bank merely required the indorsements of directors upon it in order "to cover the overdrawn account of the company" is inconsistent with the terms of the bank's letter, which states expressly that the $8500 note was required, not "to cover," but "to reduce," the account. A renewal note could not possibly reduce the overdrafts. The plain import of the letter is that the bank required, not a renewal, but a new note for $8500, which was to be discounted, and the proceeds, instead of being paid to the company, applied in extinction pro tanto of these overdrafts, in order to bring the balance due below $10,000.

The evidence of Mr. Marler and of the appellant is to the effect that these two documents were new discount notes and not renewals, and their testimony is corroborated by that of the respondent himself. He was adduced as a witness for the appellant, and was examined in regard to the two notes for $8500 and $4500 bearing date the 21st and 26th of March, 1877. These were undoubtedly renewals of the two notes of that amount given to the bank in August, 1875, but the respondent did not assert that they were, as the learned judges have assumed, "renewals of other notes which, prior to the 24th of July, 1875, were indorsed by Macdonald alone." His statement is:—"The note for eight thousand five hundred dollars, and the one for four thousand five hundred, are renewals for former notes of like amount between the same parties."

These facts connected with the making and issue of the three promissory notes for $10,000, $8500, and $4500 in August, 1875, are only of importance in so far as they tend to explain the true legal relation in which the appellant and the respondent, as parties to these notes, stand towards each other. The respondent maintains that, although neither of them gave or received value for the notes, but put their respective indorsations upon them for the accommodation of the St. John's Stone Chinaware Company, the appellant, having first written his name upon the back of the notes, has thereby become liable to him, in the same

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manner, and to the same effect, as if he had been a prior indorser upon a proper commercial bill.

Had the appellant been, in point of fact, the holder of the notes, and had the respondent, in these circumstances, given his indorsements to the Merchants' Bank of Canada, which was about to discount them, the appellant would have been bound to indemnify the respondent against any demand made upon him by the bank, or any subsequent holder, to the same extent as if the respondent had been a proper indorser. That was held to be the legal effect of such an indorsement in *Penny* v. *Innes* (1).

In the present case the appellant, although his indorsement was first written, was a stranger to the notes in the same sense as the respondent, and it is not matter of dispute that the indorsements of both were given for one and the same purpose, viz., in order to induce the bank to discount two of the notes, and pay the proceeds to the promissor, the St. John's Stone Chinaware Company, and also to give the company credit in account current to the amount of the third note. It was argued, however, for the respondent that, in the absence of some special contract or agreement between them, dehors the notes themselves, strangers giving their indorsements successively must be held to have undertaken the same liabilities inter se which are incumbent on successive holders and indorsers of a note for value. The appellant and respondent must therefore, it was said, be assumed to stand towards each other in the relation of prior and subsequent indorsers for value, inasmuch as it had not been proved, habili modo, that they had specially agreed that their indorsements were to have the effect of making them co-sureties for the promissor. On the other hand, it was contended for the appellant that all the directors who indorsed the notes in question must now be treated as co-sureties, seeing that their indorsements were made, without reference to the order of their signatures, in pursuance of a mutual agreement to give their joint guarantee to the bank that the notes would be duly retired by the company.

Their Lordships see no reason to doubt that the liabilities inter se of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined

(1) C. M. & R. vol. i. p. 439.

according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such acts and circumstances, he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds.

The appellant has not attempted to establish an independent collateral agreement by the respondent to contribute equally with him and the other indorsers in the event of the company's failure to make payment of the notes in question to the bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the company. And in the opinion of their Lordships that is the proper legal inference to be derived from the circumstances of the present case.

Their Lordships construe the bank letter of the 24th of July, 1875, as preferring a direct request that the directors should become bound to the bank as co-sureties for the company. The

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bank did not require that the appellant should become surety for the company, that the respondent should then become surety for the appellant, and that Mr. Coote, in his turn, should guarantee the solvency of the respondent. What the bank asked was "the personal guarantee of your directors," and what the directors agreed to give at their meeting on the 5th of August, 1875, was "the personal indorsation required by the bank." Apart from the mere circumstance of the order in which the indorsements were made, the res gestæ of the meeting of the 5th of August, as disclosed in evidence, make it perfectly plain that the directors were asked and agreed to become co-sureties for the company, without any stipulation whatever as to their becoming inter se sureties for each other, or as to the order of their indorsing. Their Lordships attach no weight to the terms of the so-called letter of guarantee which was returned to the bank along with the demand note for $10,000, or to the fact that it was not signed by the respondent. The letter contains no obligation of guarantee, and simply explains, what would otherwise have sufficiently appeared from the bank's own letter, that the $10,000 note was not for immediate discount, but was to be held by the bank as a collateral security for the company's debit balance in account current.

But the respondent insists, and the Court below seem to have held, that, in determining the rights and liabilities inter se of these indorsers for the accommodation of the company, regard must be had, not to the contract in pursuance of which they became indorsers, but to the order of their indorsements, as evidencing the terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the present, the signing of their names on the note, by way of indorsement, in order to induce the bank to discount it to the promissor, is not, as between the indorsers, pars contractus, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities inter se, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement. The law upon this point was

correctly laid down by the Court of Common Pleas in *Reynolds* v. *Wheeler* (1). In that case, one Cheeseman drew a bill, and asked Reynolds to accept it for his accommodation, which Reynolds did. The bank refused to discount, whereupon Wheeler, at the request of Cheeseman, indorsed, and the bill was then discounted, Cheeseman receiving the proceeds. The bill was renewed at maturity, Reynolds, on this occasion, being drawer, and Cheeseman acceptor, whilst Wheeler indorsed it as he had done before. Reynolds paid the renewal bill, and claimed contribution from Wheeler as a surety with him for the same debt. Wheeler resisted the claim on the same plea which is put forward by the respondent in the present case, viz., that, in the circumstances, he had only agreed to undertake the liability evidenced by the indorsement, and consequently that he was not liable in relief or contribution to one who, like Reynolds, had previously become party to the bill as drawer or acceptor. But the Court overruled the plea. Erle, C.J., said, "The substance of the transaction is this:—Cheeseman was in want of money, and applied to Reynolds and to Wheeler to lend him their names in order to obtain it. If the money had been raised by the joint and several note or bond of the three, it could not have for a moment been contended that Reynolds, paying the whole, would not have been entitled to contribution. The machinery adopted here was the drawing of a note by Cheeseman upon Reynolds and the endorsement of it by Wheeler." And Williams, J., stating the law to the same effect, said, "If the relation of surety subsists, he (Reynolds) is entitled to contribution, and we are entitled to disregard the form of the instrument."

In the present case the directors of the St. John's Stone China-ware Company one and all agreed with each other to become sureties to the bank for the same debts of the company. That was the substance of the agreement to which they came on the 5th of August, 1875, and the fact that the machinery which they adopted for carrying out their agreement was the making of three promissory notes by the company, payable to the appellant, and successively indorsed by him and his co-directors, cannot have, in law, the effect of altering the mutual relations established by

(1) 10 C. B. (N.S.) 561.

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that agreement, and of substituting for these the liabilities of proper indorsers of an ordinary commercial note.

It was argued, however, that the respondent gave his indorsements at the request of the appellant, and must therefore be held to have given them on the faith of his having recourse against the appellant as a prior indorser. That contention was rested upon certain statements made by the respondent in his deposition as a witness for the appellant. He stated, "I was asked to indorse the notes in question by Edward Macdonald, in fact urged to do so, to sign them, that it was all right, which I did." Again, in answer to the question by his own counsel, "At whose instance did you indorse the notes in question?" he says, "At the instance of Edward Macdonald." The argument is really without foundation in fact. There is not a word in those statements to suggest that the appellant, Edward Macdonald, did anything more than urge the respondent to carry out the agreement which had already been come to by all the directors present in order to aid the finances of the company.

The authority of *Reynolds* v. *Wheeler* (1), and similar cases, is in no wise affected by the decision of the House of Lords in the Scotch case of *Steele* v. *Mackinlay* (2), which is referred to in the judgment of the Court below. In that case A., acting on behalf of his sons B. and C., arranged with D. that the latter should make an advance to them of £1000 upon their personal security. D. accordingly drew a bill for that amount on B. and C., and delivered it to A. in order that he might procure their acceptances. A. did obtain their acceptances, and before returning the accepted bill to D., he wrote his own name upon the back of it. The acceptors failed to retire the bill, and D., the drawer, brought an action against the representative of A. (who had died in the meantime) for recovery of its contents, upon the allegation that A. had signed as a co-acceptor, or at all events with the intention and effect of becoming a surety to him for the acceptors. Parol evidence was led, not only in regard to the making and issue of the bill, but also in regard to statements made at various times by the deceased, tending to prove a separate and independent engagement by him to guarantee payment of the bill by his

(1) 10 C. B. (N.S.) 561. (2) 5 App. Cas. 754.

sons. The admissibility of the evidence, so far as it bore upon the facts and circumstances connected with the making and indorsement of the bill, was not questioned either at the bar or by the House. On the contrary, the House did take that evidence into account, although it was ultimately held that the claim preferred by D. was neither supported by the principles of the law-merchant, nor by any inference derivable from these facts and circumstances. But the House rejected the parol evidence adduced by D. in order to establish an independent contract of guarantee, upon the ground that such a contract could only be proved by a writing properly signed under the 6th section of the Mercantile Law Amendment (Scotland) Act, 1856, which extends to Scotland the provisions of the English Statute of Frauds with respect to mercantile guarantees.

The respondent's counsel, in the course of the argument, referred to the case of *Jansen* v. *Paxton* (1), decided by the Court of Error and Appeal in Upper Canada, and to three other decisions of the Canadian Courts. With the same view, they cited the case of *Macdonald* v. *Magruder* (2), decided in 1830 by the Court of New York, United States. These authorities were relied upon as establishing the doctrine that, where several persons mutually agree to give their indorsements on a bill as securities for the holder who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper indorsers, liable to indemnify each other successively, according to the priority of their indorsements, unless it had been specially stipulated that they were to be liable as co-sureties. It is unnecessary to enter into a minute criticism of these cases. Some of them are, in their circumstances, distinguishable from the present case; but there are undoubtedly to be found in the opinions of the learned judges by whom they were decided dicta which seem to recognise the doctrine contended for by the respondent. If they are to be regarded as authorities to that effect, their Lordships cannot accept these cases as conclusive of the law of England, or as precedents which ought to govern the decision of this appeal. The Civil Code of Lower Canada (article 2340) enacts

(1) 28 C. P. (U.C.) 439. (2) 3 Peters, 470; 8 Curtis, 491.

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that "in all matters relating to bills of exchange not provided for in the Code, recourse must be had to the laws of England in force on the 30th day of May, 1849." By article 2346 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and the respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in *Reynolds* v. *Wheeler* (1).

Their Lordships will, accordingly, advise Her Majesty that the judgment appealed from ought to be reversed; and that the action en guarantie at the respondent's instance ought to be dismissed, with the declaration that the appellant and the respondent made their several indorsements upon the promissory notes in question, along with other directors of the St. John's Stone China-ware Company, as co-sureties for the said company, and are, in that capacity, entitled and liable to equal contribution inter se.

The respondent must pay to the appellant the costs of this appeal, and also the costs incurred by him in the Courts below.

Solicitors for appellant: *Simpson, Hammond, & Co.*

Solicitors for respondent: *Robins & Peters.*

(1) 10 C. B. (N.S.) 561.

[PRIVY COUNCIL.]

RAVENA MANA CHENA ALLAGAPPA CHITTY AND ANOTHER . . . . . } PLAINTIFFS;

AND

TUNKU ALLUM BIN SULTAN ALLIE ISKANDER SHAH . . . . . } DEFENDANT.

J. C.* 1883 Jan. 6.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENT, SINGAPORE.

Construction—Grant to A. his Heirs and Successors.

Case where the grant by a treaty between two sovereigns of a monthly pension to A., his heirs and successors, was held, according to its true construction, not to confer such an interest therein upon A. as to enable him to assign it beyond the period of his own life.

APPEAL from a decree of the Supreme Court (April 20, 1882), which confirmed a decree of the Chief Justice of the same Court (Dec. 29, 1881), whereby the appellants' suit was dismissed.

On the 1st of June, 1860, Sultan Allie borrowed $53,600 from Ravena Chitty, and as security assigned to him by deed a monthly payment of $500 granted to him (Sultan Allie) under a treaty made in 1855, and set out in the judgment of their Lordships. The grantor and his successors had notice of this assignment, and regularly paid the monthly sum to Ravena Chitty till December, 1876. Sultan Allie died on the 20th of June, 1877, leaving the respondent, his eldest son and heir, now a private person, while he was succeeded in his sovereignty by the Maharajah of Johore, the successor of the grantor, who prior to 1877 paid the monthly sum to the Colonial Treasurer, by whom it was paid to the family of the deceased Sultan.

On the 18th of September, 1880, the debt of $53,600 and all arrears of interest, and also the deed pledging the monthly sum of $500 as security, were assigned by Ravena Chitty to the appellants, who on the 29th of August, 1881, sued the defendant to recover the same. The question in the appeal was whether the right to this monthly payment was assignable beyond the life of the grantee.

* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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RAVENA MANA CHENA ALLAGAPPA CHITTY v. TUNKU ALLUM BIN SULTAN ALLIE ISKANDER SHAH.

The Solicitor-General (Sir *F. Herschell*) and *Rigby*, Q.C. (*Mayne*, with them), for the appellants, contended that the interest of Sultan Allie in the monthly sum of $500 was such as could be alienated, and that the appellants were entitled to satisfaction of their claim thereout. A grant to a sovereign, his heirs and successors, gives an absolute alienable interest. As regards sovereignty there is no distinction between public and private property with regard to these Eastern sovereigns: and see *Elphinstone* v. *Bedreechund* (1). With regard to the law of Johore and the question whether under that law an absolute interest passed to the Sultan, no proof of the state of that law was given, and therefore it must be assumed to be the same as the law of England, by which a grant to the sovereign, his heirs and successors, vests an absolute estate in fee simple. There would be no remedy against the sovereign refusing to pay, but there is against the payee who has received the money. Reference was made to *Kinloch* v. *Secretary of State for India* (2). The money was paid to the British Government under the treaty, and therefore for the benefit of whoever was entitled to it. There is nothing in the treaty to prevent alienation. The word "assigns" was not wanted; "heirs" was sufficient to create an absolute estate: *M'Carthy* v. *Goold* (3); *Earl of Stafford* v. *Buckley* (4); *Wells* v. *Foster* (5); *Willcock* v. *Terrell* (6).

The Attorney-General (Sir *H. James*), *Davey*, Q.C., and *Jeune*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that, on the true construction of the treaty, the $500 a month stipulated to be paid by Sri Maharajah, his heirs and successors, to Sultan Allie, was not assignable by Sultan Allie beyond the period of his own life.

The object of the treaty, as appears by the recital, was to put a final end to differences and disagreements which had subsisted between the two rajahs relative to their respective claims on the

(1) 1 Knapp, 329, n.
(2) 7 App. Cas. 619.
(3) 1 B. & B. 387.
(4) 2 Ves. Sen. 171.
(5) 8 M. & W. 149.
(6) 3 Ex. D. 323.

territory and sovereignty of Johore, and to establish and maintain peace, friendship, and amicable relations between them. Though the words "heirs and successors" are not used in the recital, the object of the treaty was stated to be "to maintain peace, friendship, and thoroughly amicable relations between them from thenceforth in all time to come." The first article declared that "his Highness Sultan Allie, for himself, his heirs and successors, does hereby cede in full sovereignty and absolute property to his Highness Sri Maharajah, his heirs and successors for ever, the whole of the territory of Johore." The second article is:—"In consideration of the cession contained in the foregoing article, his Highness Sri Maharajah does hereby agree to pay immediately after the execution of these articles, to his Highness Sultan Allie, the sum of 5000 Spanish dollars." With regard to that sum Sultan Allie had, no doubt, the power of disposing of it. It was to be paid to Sultan Allie himself. But then Sri Maharajah further engaged that he, his heirs and successors, would from and after the 1st day of January, 1855, pay to Sultan Allie, his heirs and successors, the sum of 500 Spanish dollars per mensem. By the third article Sri Maharajah withdrew all claim whatsoever to the said territory of Kassang, describing it, and consented that Sultan Allie, his heirs and successors, should have and enjoy the same in full sovereignty and property for ever. The object of the treaty being to settle all disputes, the arrangement was that Sri Maharajah should have the sovereignty of Johore, to him and his successors, for ever; and that Sultan Allie, and his heirs and successors, for ever, should retain the sovereignty over the territory of Kassang, and, in addition to the sovereignty of Kassang, he and his successors should receive from the Maharajah of Johore the sum of 500 Spanish dollars per month. Then Sultan Allie, by the fourth article, stipulated that the said territory of Kassang should not be alienated or disposed of to any party or power without the same being in the first place offered to the East India Company, and then to his Highness Sri Maharajah, his heirs and successors, on such terms as his Highness Sultan Allie, his heirs or successors, might be desirous to cede it to any one other party or power willing to treat for the same." That was merely a stipulation that, although Sultan Allie was to retain the

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sovereignty of Kassang to him and his successors, they should not alienate it without giving the preference to the East India Company or to Sri Maharajah to take it upon certain terms. The fifth article also appears to be important in considering whether the words "heirs and successors" were to include "assigns." It is in the words following: "The subjects of each of the said contracting parties shall have full liberty to trade to and pass in and out of their respective territories," and so on; "and each of the said contracting parties, for himself, his heirs and successors, hereby solemnly engages to do no act calculated or having a tendency to promote or foment disturbances within the territory of the other of them, but in all respects truly and faithfully to adhere to and observe the engagements hereby entered into by them respectively." One object, as it appears to their Lordships, of that part of the treaty by which the Maharajah of Johore stipulated to pay the $500 a month to Sultan Allie, and his heirs and successors, was that the payment should operate as an inducement to Sultan Allie and his successors not to foment disturbances within the territory of Johore, the claim to which had been given up by Sultan Allie to the Maharajah of Johore.

Their Lordships are of opinion that by the term "heirs and successors" such an interest was not given to Sultan Allie in the $500 per month as enabled him to assign or transfer it beyond the period of his own life. If he could do so, his heirs would have no pecuniary inducement to restrain them from acts calculated or having a tendency to promote or foment disturbance within the territory of Johore. Looking to the whole scope of the treaty, their Lordships are of opinion that Sultan Allie had no power to assign to the plaintiff the $500 a month for a period beyond that of his own life. That life having ceased to exist, the plaintiff, who has to make out his title to the monthly payment, has wholly failed.

Their Lordships think that the judgments of both the Courts below were correct, and that this decree ought to be affirmed. They will, therefore, humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

Solicitors for appellants: *Hacon & Turner.*
Solicitors for respondent: *Sutton & Ommanney.*

[PRIVY COUNCIL.]

CHARLES DUDLEY ROBERT WARD . DEFENDANT;

AND

THE NATIONAL BANK OF NEW ZEALAND, LIMITED . . . . . PLAINTIFF.

J. C.*

1883

June 15, 19; *July* 11.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

Principal and Surety—Co-Sureties in Severalty—Release—Pleading.

Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must shew an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release.

Held, in an action upon a guarantee, that a plea to the effect that M. was the defendant's co-surety, and had been released in consideration of a new guarantee given to the plaintiff, constituted no defence: the plea nowhere averring or implying that the liability was joint, or that the defendant became surety on the faith of M.'s co-suretyship, or that any right of contribution had arisen against M. which had been taken away or injuriously affected, or that the defendant had suffered any damage or injury by the substitution described.

APPEAL from an order (May 8, 1882) of the Court of Appeal (Canterbury District) in an action brought by the respondent against the appellant to recover £1000 with interest at the rate of 8 per cent. per annum from the 9th of May, 1879. The order directed that a rule nisi calling upon the appellant to shew cause why judgment should not be entered for the respondent non obstante veredicto be made absolute.

The appellant had given a limited guarantee to the respondent to secure advances to John King. And the question decided upon this appeal was whether or not the appellant was discharged from liability on his guarantee by reason of certain transactions between the respondent and the appellant's co-surety, John Macintosh.

Those circumstances, together with the other facts and pleadings in the case, appear in the judgment of their Lordships.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1883 WARD v. NATIONAL BANK OF NEW ZEALAND.

The action was brought on the 21st of March, 1881, followed by plea and replication. The verdict and rule nisi were taken by consent on the 15th of December, 1881.

The judgment of the Court (Pendergast, C.J., Richmond and Williams, JJ.), was to the effect that those transactions did not per se operate to discharge the defendant, that he must shew actual damage resulting therefrom, and had not done so, it being consistent with the facts disclosed that the defendant, so far from being injured, might possibly have been benefited thereby. Williams, J., held that even if he had proved that he was damnified, he could only be released pro tanto.

Davey, Q.C., and *B. B. Rogers*, for the appellant, contended that this was an erroneous view of the law, and referred to *Holme* v. *Brunskill* (1) and *Polak* v. *Everett* (2) per Blackburn, J., who puts it that if time is given for an hour and not one farthing damage is sustained, but on the contrary benefit, nevertheless the surety is discharged. The question of detriment or benefit to the surety cannot be gone into as essential, without frittering away a clear rule of law. Reference was made to *Pledge* v. *Buss* (3). A surety may be discharged by a transaction which has benefited him. The principle is, that if a man becomes a surety and pays he acquires the right of action against the debtor, and the benefit of all the securities which at the time the creditor holds. If the creditor alters his rights in any way, then the contract is broken, and the surety is in consequence discharged. Those rights of the surety can be infringed by the creditor giving time to or releasing either the principal or co-surety. In the latter case the right of contribution, which is founded upon equity independent of express contract, as between co-sureties is impaired or lost. Reference was made to *Dering* v. *Lord Winchelsea* (4); *Craythorne* v. *Swinburne* (5); *Stirling* v. *Forrester* (6); *Duncan, Fox, & Co.* v. *North and South Wales Bank* (7); *Mayhew* v. *Crickett* (8); *Rees* v. *Berrington* (9); *Samuel* v.

(1) 3 Q. B. D. 495.
(2) 1 Q. B. D. 669.
(3) Joh. 663.
(4) 1 W. & T. 106.
(5) 14 Ves. 160.
(6) 3 Bli. H. L. 575.
(7) 6 App. Cas. 1.
(8) 2 Sw. 185.
(9) 2 Ves. 540; 2 W. & T. 992.

Howarth (1); *Croydon Commercial Gas Company* v. *Dickinson* (2). The only colonial statute bearing on this subject, which is otherwise to be dealt with by the law of England, is 24 Vict. No. 8 (the Mercantile Law Amendment Act, 1860), sect. 6. If the question of damage were material, it was submitted that the right inference from the circumstances was that the appellant was damaged, and that at all events the onus was on the respondents to shew that the appellant had sustained no injury.

Cohen, Q.C., and *Pollard*, for the respondent, contended that the question whether a surety is released in consequence of what is done with the co-surety is distinct from the question whether he is released by dealings between the principal debtor and the creditor. Though if the debtor is released the surety is so also, it does not follow that if the surety is released, the co-surety is so in all cases. He is only so pro tanto. If he is placed in the same position as he would have been in, had the surety paid instead of being released, he is not damnified. The cases cited are those in which the guaranteed agreement itself was varied: *Polak* v. *Everett*, per Quain J. (3); *Rainbow and Wife* v. *Juggins* (4). In *Rees* v. *Berrington* (5) the surety was discharged "to the extent of such security." Reference was made to *Strange* v. *Fookes* (6); *Capel* v. *Butler* (7); *Wulff* v. *Jay* (8); *Stirling* v. *Forrester* (9); Leake on Contracts, p. 802: "As a new agreement with the debtor in variation of the original contract is equivalent to a discharge of that contract, and a substitution of a new contract in its place, upon the principles above stated it follows that if a third party has guaranteed the due performance of the original contract he is also discharged from that liability; and he is not affected with any liability in respect of the substituted contract unless with full knowledge of all the circumstances he consent to continue surety under it." In all cases other than a guaranteed agreement, in order to discharge the surety, it must appear that

(1) 3 Mer. 272.
(2) 2 C. P. D. 46.
(3) 1 Q. B. D. 669.
(4) 5 Q. B. D. 138.
(5) 2 W. & T. 992.
(6) 4 Giff. 408.
(7) 2 S. & S. 457.
(8) Law Rep. 7 Q. B. 756.
(9) 3 Bli. H. L. 575.

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the surety has been injured or his rights abridged: *Petty* v. *Cooke* (1). Something must be done against the faith of his contract. The release of a surety does not discharge the co-surety, except to the extent of the contribution which is lost: *Nicholson* v. *Revill* (2). No right of contribution accrues until the surety has paid more than his share of the debt, and then the damage done to him (if any) by the release of the co-surety can be adjusted: *Davies* v. *Humphreys* (3); *Farebrother* v. *Wodehouse* (4). This is not the case of a guarantee for a fixed amount, but for a floating balance.

Davey, Q.C., replied, referring to the following additional cases: *Evans* v. *Bremridge* (5), the principles of the law laid down in *Newton* v. *Chorlton* (6), to *Pear* v. *Deacon* (7); *Forbes* v. *Jackson* (8); *Croydon Gas Co.* v. *Dickinson* (9); *Wade* v. *Cooper* (10).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an appeal from a judgment of the Supreme Court of New Zealand, in an action brought by the National Bank of New Zealand, against Charles Dudley Robert Ward. The declaration set out the following agreement, in writing, between the plaintiff and defendant:—

"To the National Bank of New Zealand, Limited, incorporated under 'The Companies Acts, 1862 and 1867, and the New Zealand Act I., 1873.'

"Guaranty:—

"In consideration of your making any advances to John King, auctioneer, &c., Timaru, either by discounting bills or notes, or otherwise, I hereby guarantee you the due payment of all such advances not exceeding in the whole the sum of one thousand

(1) Law Rep. 6 Q. B. 790.
(2) 4 A. & E. 675.
(3) 6 M. & W. 153.
(4) 23 Beav. 18.
(5) 2 K. & J. 174.
(6) 10 Hare, 648.
(7) 1 De G. & J. 461.
(8) 19 Ch. D. 615.
(9) 2 C. P. D. 51.
(10) 2 Sim. 155.

pounds, and further agree that you may advance any amount beyond such sum of £1000 to the said John King, and that no payment received by you from the said John King shall be taken in reduction of my liability on this guarantee, and that this guarantee shall always be a continuing and standing guarantee for the amount due to you from the said John King, and that you may give any time to and take any security from the said John King, and accept any composition from, or release, or discharge the said John King, or any of the parties, to any bills or notes so discounted by you as aforesaid, without prejudice to your claim upon me under this guarantee.

"Timaru, 29th March, 1879."

It averred,—

"That the plaintiff, after the making and giving of the said guarantee and promise of the said defendant, and in reliance thereon, did from time to time make divers advances of money, and discount bills and notes to, for, and at the request of the said John King, in the ordinary course of business, by permitting the said John King to overdraw a banking account which he kept with the plaintiff at Timaru aforesaid, and by honouring his drafts and orders when the said account was overdrawn.

"The advances made by the plaintiff to the said John King on the security of the said guarantee up to the 9th day of May, 1879, when the plaintiff, by notice in writing, demanding payment of the sum of £1000 under the said guarantee, determined the further continuance thereof, and which the said John King was unable and neglected and refused to pay, amounted to a sum far exceeding the sum of £1000, of all which the said defendant had notice.

"The plaintiff has demanded of the defendant payment of the said sum of £1000 and has done all things necessary to entitle the plaintiff to maintain this action, yet the defendant has not paid to the plaintiff the said sum, or any part of it, nor to King."

To this declaration the defendant pleaded the following plea:—

"That at the time of the making and giving of the guarantee set out in the declaration, one John Macintosh was a co-surety with the defendants for the payment of the advances which the

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first guarantee was given to secure by virtue of a certain other guarantee for the payment of such advances made and given by the said John Macintosh to the plaintiff on the 17th of May, 1878."

A guarantee of that date by Macintosh was then set out identical in its terms with that before set out, except that the sum guaranteed was £600. The plea proceeded:—

"And that afterwards, and prior to the 29th day of March, 1879, the date on which the guarantee, set out in the declaration, was made and given by the defendant, the plaintiff received from the said John King bills of exchange drawn by the said John King, and payable to his order, and accepted by the said John Macintosh, for the sum of £1400, and to the value of £1400, and that the before-mentioned guarantee of the said John Macintosh, and the said bills of exchange accepted by the said John Macintosh as aforesaid, were on the said 29th day of March, 1879, and up to and on the 3rd day of April, 1879, held by the plaintiff as security for the payment of such advances as aforesaid.

"That on the said 3rd day of April, 1879, it was arranged and agreed by and between the plaintiff and the said John King and John Macintosh, that the said John Macintosh should be released from liability on his before-mentioned guarantee, and the bills of exchange for £1400 accepted by him as aforesaid, in consideration of a new guarantee being given by the said John Macintosh to the plaintiff, in the words and figures following:—

"To the National Bank of New Zealand, Limited, incorporated under 'The Companies Acts, 1862 and 1867, and the New Zealand Act I., 1873.'

"Guaranty:—

"In consideration of your making any advances to Mr. John King, auctioneer, &c., Timaru, either by discounting bills or notes, or otherwise, I hereby guarantee you the due payment of all such advances, not exceeding in the whole the sum of two thousand pounds, and further agree that you may advance any amount beyond such sum of two thousand pounds to the said John King, and that no payment received by you from the said

John King shall be taken in reduction of my liability on this guarantee, and that this guarantee shall always be a continuing and standing guarantee for the amount due to you from the said John King, and that you may give any time to and take any security from the said John King, and accept any composition from or release or discharge the said John King or any of the parties to any bills or notes so discounted by you as aforesaid, without prejudice to your claim upon me under this guarantee.

"John Macintosh."

"And the said new guarantee was then made and given by the said John Macintosh to the plaintiff, the latter previously agreeing with the said John Macintosh that if he, the said John Macintosh, would give such new guarantee the plaintiff would not press him, the said John Macintosh, for payment of the moneys secured by the new guarantee, in the same way as if the bills of exchange were still held by the plaintiff, in respect of such advances as aforesaid, and the new guarantee not made and given; and in consideration of the making and giving of the said new guarantee by the said John Macintosh, as aforesaid, the plaintiff then released and discharged the said John Macintosh from all liability on the said old guarantee, and the beforementioned bills of exchange, on and in respect of which he was previously liable to the plaintiff.

"That the transactions narrated in the two last preceding paragraphs of this plea as having taken place on the 3rd day of April, 1879, took place without the knowledge or consent of the defendant."

All the material allegations in the plea were denied by the plaintiff in his replication.

A number of issues were settled, and the cause went to trial before a jury, whose findings on such of the issues as were deemed material appear to have been taken by consent, and may be shortly described as amounting to findings in favour of the defendant of all the allegations in the plea.

A verdict having been entered by consent for the defendant, a rule was obtained by the plaintiff to shew cause why the verdict should not be entered for him notwithstanding the verdict for the

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defendant; it was argued in the Court of Appeal of New Zealand on the following grounds stated by consent:—

"1. That the matters alleged in the third plea are no answer to the declaration in this action.

"2. That the defendant was not released from liability under the guarantee set out in the declaration, by the release from liability of the said John Macintosh on the guarantee, and the bills of exchange, in the first paragraph of the plea referred to.

"3. That the defendant was not, by the giving by the said John Macintosh of the guarantee in the second paragraph of the third plea referred to, and set out in substitution for the guarantee of the 17th day of May, 1878, and for the said bills of exchange, released from liability on his said guarantee.

"4. That under the guarantee given by the defendant to the plaintiff, the plaintiff was entitled to release the said John Macintosh from liability, under the said guarantee of the 17th day of May, 1878, and on the said bills of exchange, and was entitled to take the said new guarantee from the said John Macintosh without releasing the defendant from liability on his said guarantee.

"5. That it appears from the facts alleged in the said plea that the arrangement made between the plaintiff, the said John King, and the said John Macintosh, for the release from liability of the said John Macintosh on the said guarantee, and the said bills of exchange, and for the giving by the said John Macintosh of the said new guarantee, was unsubstantial, and one which could not be prejudicial to the defendant.

"6. That it appears from the declaration that the amount advanced to the said John King, and owing by him to the plaintiff, was a sum far exceeding the sum of £1000 and that the defendant has notice of the said amount so advanced and owing."

After argument, the rule nisi was made absolute, and from the judgment making it absolute the present appeal is preferred.

The question is, whether the plea if proved is an answer to the action.

Their Lordships' attention has been called to this provision in the guarantee, "you may give any time to and take any security

from the said John King," and it has been argued that inasmuch as those words would be unnecessary to enable the plaintiff to take additional security from King, they must, if they have any meaning, refer to some security or change of security which might be to the prejudice of the guarantor, and would comprise the substitution of the second security of Macintosh for the first. This argument is not without force, but their Lordships prefer deciding the appeal on broader grounds.

A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed.

In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured, and may even be benefited thereby. The reason of this rule is thus given by Lord Eldon in the case of *Samuel* v. *Howarth* (1), "The surety is discharged for this reason, because the creditor in so giving time to the surety has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not. . . . It has been truly stated that the renewal of bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that. . . . The creditor has no right, it is *against the faith of his contract,* to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."

A recent decision of the Court of Appeal, in *Holme* v. *Brunskill* (2), is based on the same principle. The defendant gave the plaintiff a bond that the tenant of his farm should on the expiration of his tenancy redeliver a flock of sheep on the farm in good order and condition. By an agreement between the plaintiff and the tenant the tenant gave up a field on the farm, and held the remainder at a reduced rental. The jury, at the trial, having found that the surety was not prejudiced by this agreement, it was held by Lords Justices Cotton and Thesiger (Lord Justice Brett dissenting) that, notwithstanding the finding of the jury, the surety was released.

(1) 3 Mer. 272.

(2) 3 Q. B. D. 495.

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Lord Justice Cotton observes: "The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry into the effect of the alteration." The ratio decidendi is thus stated, "The plaintiff attempts to substitute for the contract that the flock shall be given up in good condition with the farm as then demised, a contract that it should be delivered up in like condition with a farm of different extent. . . . The surety ought to have been asked to decide whether he would assent to the variation. He never did assent, and in my opinion was discharged from liability." To the same effect is *Polak* v. *Everett* (1), where, there being a stipulation that half the book debts of the debtor should, under certain circumstances, be made over to the creditor, he released the book debts, and accepted in lieu thereof a supposed equivalent. The ground of the decision is thus stated by Quain, J.: "The contract of the surety should not be altered without his consent, and the creditor should not undertake to alter the contract and then say, 'Although the contract has been altered, and I have put it out of my power to carry it out by a voluntary act, I now offer you an equivalent.'"

On the same principle it has been held that when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. In *Bonser* v. *Cox* (2), where the defendant agreed to become a surety for Richard Cox in a joint and several bond to be executed by Richard Cox and himself, and the execution of the bond by Richard Cox was not obtained, Lord Langdale observes, "The surety has a right to say, 'The arrangement was that Richard Cox, as well as myself, should be held bound by bond to the

(1) 1 Q. B. D. 669. (2) 4 Beav. 379.

creditor, that arrangement never was carried into effect,' " and the decision would obviously have been the same if Richard Cox had executed the bond and had been afterwards released.

But where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety, the surety cannot therefore claim to be released on the ground of breach of contract.

It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon contract but on principles established by Courts of Equity.

This right of contribution was established in the case of *Dering* v. *Lord Winchelsea* (1), affirmed by Lord Eldon in *Craythorne* v. *Swinburne* (2), and is thus explained by Lord Redesdale in *Stirling* v. *Forrester* (3): "The principle established in the case of *Dering* v. *Lord Winchelsea* (1) is universal, that the right and duty of contribution is founded on doctrines of equity, it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give the party paying the debt all his remedies against the other debtors. . . . It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment."

In pursuance of this doctrine it has been held that a surety is entitled to the benefit of all securities in the hands of the creditor whether, when he became a surety, he knew of them or not. Thus, in *Pearl* v. *Deacon* (4), where the plaintiff was surety in a promissory note for a sum lent by the defendants to their tenant, and a mortgage was subsequently taken by the defendants on the tenant's furniture for the same debt, they afterwards, under a distress, took the same furniture for arrears of rent. It was held by Sir John Romilly that, inasmuch as the produce of the furniture was first applicable to the payment of the promissory note, the landlords could not, as against the surety, apply it to the payment of

(1) 1 Cox, 318.
(2) 14 Ves. 169.
(3) 3 Bli. 590.
(4) 24 Beav. 186; 1 De G. & J. 461.

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their rent, and that the surety was discharged, not, it is to be observed, absolutely, but pro tanto, and the decision was confirmed on appeal. It has been held in other cases that, where the creditor wastes or improperly deals with a security, the surety is released pro tanto. The claim of a several surety to be released upon the creditor releasing another surety, arises not from the creditor having broken his contract, but from his having deprived the surety of his remedy for contribution in equity. The surety, therefore, in order to support his claim, must shew that he had a right to contribution, and that that right has been taken away or injuriously affected.

Applying these principles to the construction of the plea, it is to be observed that, although the defendant avers that "Macintosh was a co-surety with him for the payment of the advances which the guarantee was given to secure," he does not aver that the liability of Macintosh and himself was joint, and it may be inferred from the instruments set out that it was not, or that he became surety on the faith of Macintosh's co-suretyship, or that he even knew of it. He does not aver that any right of contribution against Macintosh was injuriously affected, or even that any right to contribution ever arose, nor does he set out any facts from which it can be necessarily or reasonably inferred that he had suffered any damage or injury by the substitution described in the plea. The guarantee was for a floating balance; if that balance at the time when he was called upon to pay under his guarantee exceeded the amount guaranteed by himself and Macintosh, there would be no contribution between them; he does not negative that it exceeded that amount. The substituted guarantee of Macintosh of the 3rd of April was as available for him as the original guarantee for all subsequent advances to King. Under the first document Macintosh guaranteed the debt of King up to £600, and was liable to the bank on bills which were given by him as security for the debt of King up to £1400. The defendant, on paying the whole debt of King, and on that condition only, might have had recourse to the bills, but only for the purpose of obtaining the same contribution from Macintosh which he was entitled to under his second guarantee. It follows that he could only be damnified if a portion of the claim of the bank

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against him had consisted of advances to King made between the 29th of March and the 3rd of April, and he does not aver that there were any such advances.

Their Lordships are, therefore, of opinion that all the allegations in the plea, which must be taken to have been proved, constitute no defence to the action, and that the plaintiff is entitled to judgment notwithstanding the verdict. Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal dismissed. The appellant must pay the cost of the appeal.

Solicitors for appellant: *Longbourne, Longbourne, & Stevens.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL].

THE ATTORNEY-GENERAL OF ONTARIO INFORMANT;
AND
ANDREW F. MERCER . . . . . DEFENDANT.

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July 5, 6, 18.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *ss.* 102, 109—*Escheats—Rights of the Province.*

Held, that lands in Canada escheated to the Crown for defect of heirs belong to the province in which they are situated, and not to the Dominion.

At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the Crown within the then province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the words "lands, mines, minerals, and royalties," therein including, according to their true construction, royalties in respect of lands, such as escheats.

APPEAL from an order of the Supreme Court of Canada (Nov. 14, 1881) reversing an order of the Court of Appeal for

* *Present*:—THE LORD CHANCELLOR (EARL OF SELBORNE), SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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Ontario (March 27, 1880), which unanimously affirmed an order of one of the judges of the Court of Chancery (January, 1879).

On the 28th of September, 1878, the appellant filed an information on behalf of the Crown to recover from the respondent and others possession of a certain piece of land in the city of Toronto in the province of Ontario, being part of the real estate of Andrew F. Mercer, who died intestate on the 13th of June, 1871, and without leaving any heirs or next of kin. The respondent demurred thereto for want of equity. The first Court held in favour of the appellant that the land had escheated to the Crown for the benefit of the province.

The Dominion Government appealed in the name of the respondent, and it was agreed between the two Governments that the appeal should be limited to the question whether the Government of Canada or that of Ontario was entitled to lands situate in the province of Ontario and escheated to the Crown for want of heirs.

The Supreme Court by a majority (Fournier, Henry, Taschereau, and Gwynne, JJ., Ritchie, C.J., and Strong, J., dissenting) reversed the judgments of the Courts below, and dismissed the information. The reasons stated shortly were that escheat is not a reversionary right but a fiscal prerogative; that the feudal system has never existed in Canada; that the privileges of the provinces were surrendered as a preliminary to the Confederation effected by the British North America Act, 1867; that by that Act all duties and revenues were transferred to the Dominion and to be appropriated to the public service of Canada; and that the Act does not confer on the Government or Legislature of Ontario any right to receive or dispose of the revenue arising from escheated estates situate in the province.

Davey, Q.C., and *Mowat, Q.C.* (Attorney-General of Ontario), with them *Cartwright*, of the Canadian bar, and *Raleigh*, for the appellant:—

Lands in the province of Ontario are held in free and common socage. Reference was made to 31 Geo. 3, c. 31, ss. 43, 44. Escheat is a reversionary right incident to such tenure. Such lands belonged to Her Majesty for the benefit of the province

before they were granted, and must be taken to revert to the Crown for the benefit of the province on escheat for want of heirs. The Lieut.-Governor of the province, see British North America Act, 1867, sects. 72, 75, acts in the Queen's name, and therefore represents the Queen, notwithstanding that he is appointed by the Governor-General of the Dominion: see also *Théberge* v. *Laudry* (1). For an outline of the legislation shewing how public lands have been dealt with in Canada generally, and how the title thereto has been gradually transferred to the province: see 1 Anne, c. 1, especially s. 8; 39 & 40 Geo. 3, c. 88; 47 Geo. 3, c. 24; 1 Will. 4, c. 25; 1 & 2 Vict. c. 2. See also the Colonial legislation, viz. 7 Will. 4 (Upper Canada), c. 118, and after the Imperial statute, 3 & 4 Vict. c. 35, for the union of the two Canadas, see especially sects. 50, 51, 54, reference was made to 4 & 5 Vict. c. 100 (Stat. of Canada), and 12 Vict. c. 31, amending it; 9 Vict. (Canada), c. 114, in substance a re-enactment by the provincial legislature of the provisions of the Act of Union (3 & 4 Vict. c. 35), confirmed by 10 & 11 Vict. c. 71, and to 15 & 16 Vict. c. 39 (Imperial).

The question at issue turns on sects. 102 and 109 of the Act of 1867. Escheated lands are within sect. 109. The right by escheat is a species of reversion: see *Burgess* v. *Wheate* (2), and Chitty on the Prerogatives of the Crown, p. 230. [SIR MONTAGUE E. SMITH:—Blackstone puts it under the head of purchase. SIR RICHARD COUCH referred to sect. 637 of the Civil Code of Canada]. Such right, or inchoate right, or possibility of a right, is an interest of the Crown in land within sect. 109. The other side say that the right by escheat is a right to revenue within sect. 102, which has not been transferred to the province. There is no interpretation of "revenues" in the Act. But in sect. 109 the word "royalties" covers escheats. If used in a narrow sense the word would be superfluous, being included in "mines." And as regards the word "lands," all lands ungranted at the time of the Union belonged to the province, and the right to take by escheat is an interest in land which belongs to the same owner who would have had the power to grant. Escheats would also come under the head of "property and civil rights": see sect. 92,

(1) 2 App. Cas. 102. (2) 1 Eden, 227; 1 W. Bl. 123.

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cl. 13. When a subject is assigned to the province, any revenue derived from thence is also assigned. Reference was made to *Church* v. *Blake* (1); Chitty on Prerogative, p. 31. The revenues subject to the Dominion under the Act of 1867 are such as are regularly appropriated to the public service, not those which are subject to executive control, and grantable by Her Majesty ex speciali gratiâ, among which are to be reckoned the revenues arising from escheated estates. See 22 Vict. c. 16, ss. 1, 12, and 15.

The Solicitor-General (Sir *F. Herschell*) and *Lash*, Q.C., of the Canadian bar (*Jeune* with them), for the respondent:—

The appellant has failed to shew affirmatively that escheats in the province belonged to it. It is immaterial whether escheat is a matter of reversion or not: it exists jure coronæ. The law does not recognise a reversion on a grant in fee simple, but a right or prerogative of the Crown under which lands fall to the Crown under certain circumstances. Reference was made to 31 Geo. 3, c. 31, s. 43, and 2 Blackstone, p. 89. That right never belonged to the province, and therefore is unaffected by sect. 109 of the Act of 1867. The fruits of escheats were always a part of the royal revenue, and in the various statutes which deal with this question escheated lands are always treated as revenue. Those statutes deal with revenue, and not with reversionary or prerogative rights. See 1 Anne, c. 1, s. 5; 39 & 40 Geo. 3, c. 88; 59 Geo. 3, c. 94; 10 Geo. 4, c. 50, s. 126; 1 Wm. 4, c. 25, s. 12; 3 & 4 Vict. c. 35, s. 54; 9 Vict. c. 114, confirmed by 10 & 11 Vict. c. 71; 4 & 5 Vict. c. 100 (Canada), and 12 Vict. c. 31. These last two Acts dealt with public lands, including those which had escheated. "Casual revenues" must include revenues from escheats. See 15 & 16 Vict. (Imperial), c. 39, which ratifies the provisions of the two colonial Acts; for the latter assumed to legislate in regard to lands which might escheat, the only power to do so resulting from the power to deal with casual revenues as given by the Act of Union, s. 54; while Parliament gives a legislative construction to the Act which gives such power. Legislation, therefore, dealt with the fruits of escheats as revenue, and not as an

(1) 5 Duval, 594.

interest in lands; and the Dominion Parliament had the power of appropriation over such revenue. The result of the Act of 1867 was to create certain provinces with certain constitutional rights, new legislatures and new executives. Previously the lieutenant-governor of each province directly represented the Queen. Under the Act the Queen is part of the Dominion Parliament (sect. 17), not of the Ontario Legislature (sect. 69). The Lieutenant-Governor does not now represent the Queen, except where the Act so directs. Reference was made to sects. 92, 109, 117: *Russell* v. *The Queen* (1). The word "lands" does not include escheats after the Act, it includes lands ungranted and lands escheated before the Act. The word "royalties" in sect. 109 is not wide enough to include escheats, and is not a word which would be used for that purpose. Sect. 117 only refers to property actually in use for public purposes. Inasmuch as the fruits of escheats are not expressly given to the separate provinces, they belong to the Dominion.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Earl of Selborne):—

The question to be determined in this case is whether lands in the province of Ontario, escheated to the Crown for defect of heirs, "belong" (in the sense in which the verb is used in the British North America Act, 1867), to the province of Ontario or to the Dominion of Canada.

By the Imperial statute 31 Geo. 3, c. 31, s. 43, it was provided that all lands which should be thereafter granted within the province of Upper Canada (now Ontario), should be granted in free and common socage, in like manner as lands were then holden in free and common socage in England. The argument before their Lordships, on both sides, proceeded upon the assumption that the lands now in question were so holden.

All land in England, in the hands of any subject, was holden of some lord by some kind of service, and was deemed in law to

(1) 7 App. Cas. 829.

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have been originally derived from the Crown, "and therefore the King was Sovereign Lord, or Lord paramount, either mediate or immediate, of all and every parcel of land within the realm" (Co. Litt. 65a). The King had "dominium directum," the subject "dominium utile" (Ibid. 1a). The word "tenure" signified this relation of tenant to lord. Free or common socage was one of the ancient modes of tenure ("A man may hold of his lord by fealty only, and such tenure is tenure in soccage," Litt., sect. 118), which, by the statute 12 Car. 2, c. 24, was substituted throughout England for the former tenures by knight service and by soccage in capite of the King, and relieved from various feudal burdens. Some, however, of the former incidents were expressly preserved by that statute, and others (escheat being one of them), though not expressly mentioned, were not taken away.

"'Escheat' is a word of art, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated" (Co. Litt. 13a). Elsewhere (Ibid., 92b) it is called "a casual profit," as happening to the lord by "chance and unlooked for." The writ of escheat, when the tenant died without heirs, was in this form:—"The King to the Sheriff, &c. Command A., &c., that he render to B. ten acres of land, with the appurtenances, in N., which C. held of him, and which ought to revert to him, the said B., as his escheat, for that the said C. died without heirs" (F. N. B., 144 F.). If there was a mesne lord, the escheat was to him; if not, to the King.

From the use of the word "revert," in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat as a species of "reversion." There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. What is meant is that, when there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. Other writers speak of the lord as taking it by way of succession or inheritance, as if from the tenant, which is certainly not accurate. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

The profits, and the proceeds of sales, of lands escheated to the Crown, were in England part of the casual hereditary revenues of the Crown, and (subject to those powers of disposition which were reserved to the sovereign by the Restraining and Civil List Acts) they were among the hereditary revenues placed at the disposal of Parliament by the Civil List Acts passed at the beginning of the present and the last preceding reign. Those Acts extended, expressly, to all such casual revenues, arising in any of the colonies or foreign possessions of the Crown. But the right of the several Colonial Legislatures to appropriate and deal with them, within their respective territorial limits, was recognised by the Imperial Statute 15 & 16 Vict. c. 39, and by an earlier Imperial Statute (10 & 11 Vict. c. 71), confirming the Canada Civil List Act, passed in 1846 after the Union of Upper and Lower Canada, by which Act the provision made by the Colonial Legislature for the charges of the Royal Government in Canada was accepted and taken, instead of "all territorial and other revenues," then at the disposal of the Crown, arising in that province; over which (as to three-fifths permanently, and as to two-fifths during the life of the Queen, and for five years afterwards) the legislature of the province was to have full power of appropriation. It may be remarked, that the Civil List Acts of the province of Canada contained no reservation of escheats, similar to sect. 12 of each of the Imperial Civil List Acts above referred to. It must have been purposely omitted, in order that escheats might be dealt with by the Government or Legislature of Canada, and not by the Crown, in whose disposition they must have remained if they had not been in that of the United Province of Canada.

When, therefore, the "British North America Act" of 1867 passed, the revenue arising from all escheats to the Crown, within the then province of Canada, was subject to the disposal and appropriation of the Canadian Legislature.

That Act united into one "Dominion," under the name of "Canada," the former provinces of Canada (which is subdivided into the two new provinces of Ontario and Quebec, corresponding with what had been before 1840 Upper and Lower Canada), Nova Scotia, and New Brunswick. It established a Dominion Govern-

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ment and Legislature, and Provincial Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient. In particular, it imposed upon the Dominion the charge of the general public debts of the several pre-existing provinces, and vested in the Dominion (subject to exceptions, on which the present question mainly turns) the general public revenues as then existing of those provinces. This was done by sect. 102 of the Act, which is in these words:—"All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred upon them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada, in the manner, and subject to the charges, in this Act provided."

If there had been nothing in the Act leading to a contrary conclusion their Lordships might have found it difficult to hold that the word "revenues" in this section did not include territorial as well as other revenues; or that a title in the Dominion to the revenues arising from public lands did not carry with it a right of disposal and appropriation over the lands themselves. Unless, therefore, the casual revenue, arising from lands escheated to the Crown after the Union, is excepted and reserved to the Provincial Legislatures, within the meaning of this section, it would seem to follow that it belongs to the Consolidated Revenue Fund of the Dominion. If it is so excepted and reserved, it falls within sect. 126 of the Act, which provides that "such portions of the duties and revenues, over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation, as are by this Act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one Consolidated Revenue Fund, to be appropriated for the public service of the province."

Their Lordships, for the reasons above stated, assume the burden of proving that escheats, subsequent to the Union, are within the sources of revenue excepted and reserved to the provinces, to rest upon the provinces. But, if all ordinary territorial revenues arising within the provinces are so excepted and reserved, it is not à priori probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been, unless by accident and oversight, transferred to the Dominion. The words of the statute must receive their proper construction, whatever that may be; but, if this is doubtful, the more consistent and probable construction ought, in their Lordships' opinion, to be preferred. And it is a circumstance not without weight in the same direction, that while "duties and revenues" only are appropriated to the Dominion, the public property itself, by which territorial revenues are produced (as distinct from the revenues arising from it), is found to be appropriated to the provinces.

The words of exception in sect. 102 refer to revenues of two kinds: (1) such portions of the pre-existing "duties and revenues" as were by the Act "reserved to the respective Legislatures "of the provinces;" and (2), such duties and revenues as might be "raised by them, in accordance with the special powers conferred on them by the Act." It is with the former only of these two kinds of revenues that their Lordships are now concerned; the latter being the produce of that power of "direct taxation within the provinces, in order to the raising of a revenue for provincial purposes," which is conferred upon Provincial Legislatures by sect. 92 of the Act.

There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the provinces, viz., the 109th section:—"All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same." The Provincial Legislatures are not, in terms, here mentioned; but the words, "shall belong

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to the several provinces," are obviously equivalent to those used in sect. 126, "are by this Act reserved to the respective Governments or Legislatures of the Provinces." That they do not apply to all lands held as private property at the time of the Union seems clear from the corresponding language of sect. 125, "No lands or property *belonging to* "Canada, or any province, shall be liable to taxation:" where public property only must be intended. They evidently mean lands, &c., which were, at the time of the Union, in some sense, and to some extent, publici juris; and in this respect they receive illustrations from another section, the 117th (which their Lordships do not regard as otherwise very material), "The several provinces shall retain all their respective public property, not otherwise disposed of by this Act, subject to the right of Canada to assume any *lands or public property* required for fortifications, or for the defence of the country."

Their Lordships are not satisfied that sect. 102, when it speaks of certain portions of the then existing duties and revenues as "reserved to the respective Legislature of the Provinces," ought to be understood as referring to the powers of provincial legislation conferred by sect. 92. Even, however, if this were so held, the fact that exclusive powers of legislation were given to the provinces as to "the management and sale of the public lands *belonging to* the province," would still leave it necessary to resort to sect. 109 in order to determine what those public lands were. The extent of the provincial power of legislation over "property and civil rights in the province" cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under sects. 91 and 102, and therefore cannot throw much light upon the extent of the exceptions and reservations now in question.

It was not disputed, in the argument for the Dominion at the Bar, that all territorial revenues arising within each province from "lands" (in which term must be comprehended all estates in land), which at the time of the Union belonged to the Crown, were reserved to the respective provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between Crown lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the Union, and that the word

were not sufficient to reserve any lands afterwards escheated which at the time of the Union were in private hands and did not then belong to the Crown.

If the word "lands" had stood alone, it might have been difficult to resist the force of this argument. It would have been difficult to say that the right of the lord paramount to future escheats was "land belonging to him," at a time when the fee simple was still in the freeholder. If capable of being described as an interest in land, it was certainly not a present proprietary right to the land itself. The word "lands," however, does not here stand alone. The real question is as to the effect of the words "lands, mines, minerals, and royalties," taken together. In the Court of Appeal of the province of Quebec it has been held that these words are sufficient to pass subsequent escheats; and for this purpose stress was laid by some, at least, of the learned judges of that Court (the others not dissenting) on the particular word "royalties" in this context. If "lands and royalties" only had been mentioned (without "mines" and minerals") it would have been clear that the right of escheats (whenever they might fall) incident at the time of the Union to the tenure of all socage lands held from the Crown, was a "royalty" then belonging to the Crown within the province, so as to be reserved to the province by this section, and excepted from sect. 102. After full consideration, their Lordships agree with the Quebec Court in thinking that the mention of "mines" and "minerals" in this context is not enough to deprive the word "royalties" of what would, otherwise, have been its proper force. It is true (as was observed in some of the opinions of the majority of the Judges in the Supreme Court of Canada), that this word "royalties" in mining grants or leases (whether granted by the Crown or by a subject) has often a special sense, signifying that part of the reddendum which is variable, and depends upon the quantity of minerals gotten. It is also true that in Crown grants of land in British North America the practice has generally been to reserve to the Crown, not only royal mines, properly so called, but minerals generally; and that mining grants or leases had before the Union been made by the Crown both in Nova Scotia and in New Brunswick; and that in two Acts of the province of Nova

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Scotia (one as to coal mines, and the other as to mines and minerals generally) the word "royalties" had been used in its special sense, as applicable to the variable reddenda in mining grants or leases. Another Nova Scotia Act of 1849, surrendering to the Provincial Legislature the territorial and casual revenues of the Crown arising within the province, was also referred to by Mr. Justice Gwynne. But the terms of that Act were very similar to those now under consideration; and if "royalties," in the context which we have here to consider, do not necessarily and solely mean reddenda in mining grants or leases, neither may they in that statute.

It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown jure coronæ. The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate, or arise. It is a sound maxim of law, that every word ought, primâ facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense "royalties" is merely the English translation or equivalent of "regalitates," "jura regalia," "jura regia." (See, in voce "royalties," Cowell's "Interpreter;" Wharton's Law Lexicon; Tomlins' and Jacobs' Law Dictionaries.) "Regalia" and "regalitates," according to Ducange, are "jura regia;" and Spelman (Gloss. Arch.) says, "Regalia dicuntur jura omnia ad fiscum spectantia." The subject was discussed, with much fullness of learning, in *Dyke* v. *Walford* (1), where a Crown grant of jura regalia, belonging to the county palatine of Lancaster, was held to pass the right to bona vacantia. "That it is a jus" (said Mr. Ellis, in his able argument, ibid, p. 480), "is indisputable; it

(1) 5 Moore, P. C. 434.

must also be regale; for the Crown holds it generally through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights." With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case.

Their Lordships are not now called upon to decide whether the word "royalties" in sect. 109 of the British North America Act of 1867, extends to other Royal rights besides those connected with "lands," "mines," and "minerals." The question is, whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective provinces.

The conclusion at which their Lordships have arrived is, that the escheat in question belongs to the province of Ontario, and they will humbly advise Her Majesty that the judgment appealed from ought to be reversed, and that of the Vice-Chancellor and Court of Appeal of Ontario restored. It is some satisfaction to know, that in this result the Courts of Quebec and Ontario have agreed; and, though it differs from the opinion of four Judges, constituting the majority in the Supreme Court of Canada, two of the Judges of that Court, including the Chief Justice, dissented from that opinion.

This being a question of a public nature, the case does not appear to their Lordships to be one for costs.

Solicitors for appellant: *Freshfields & Williams.*
Solicitors for respondent: *Bompas, Bischoff, & Dodgson.*

[HOUSE OF LORDS.]

H. L. (E.) 1883 May 4.

WILLIAM FENTON . . . . . Appellant;

AND

CHARLES HARRISON AND OTHERS . . Respondents.

Railway Company—Borrowing Powers.

THIS appeal from the Court of Appeal turned entirely upon the priorities of debenture stock holders and mortgagees under various clauses of several special Acts of a railway company, and involved the decision of no general principle of law whatever. It is therefore enough to say that the House (Earl of Selborne L.C. and Lords Blackburn, Watson and FitzGerald) without hearing the respondents' counsel affirmed the decision of the Court of Appeal for the reasons given in the judgment of Jessel M.R. (1)

The point of practice as to costs, decided in the Court of Appeal, was not raised in this appeal.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 4th May 1883.

Counsel for the appellants, *Davey Q.C. Webster Q.C.* and *Medd.* Solicitors, *Maples Teesdale & Co.*

Counsel for Sir T. Brassey, respondent, *H. A. Giffard Q.C. W. Pearson Q.C.* and *Norton.* Solicitors, *Norton Rose Norton & Brewer.*

Counsel for the Cornwall Minerals Railway Co., respondents, *Graham Hastings Q.C.* and *Prior.* Solicitors, *Cope & Co.*

Counsel for the remaining respondents, *Kekewich Q.C. Rigby Q.C.* and *Stirling.* Solicitors, *Murray Hutchins & Stirling.*

(1) Reported sub nom. *Harrison* v. *Cornwall Minerals Ry. Co.* 18 Ch. D. 334, 340.

[HOUSE OF LORDS.]

H. L. (E.)
1883
June 4.

THE JUSTICES OF THE PEACE FOR THE WEST RIDING OF THE COUNTY OF YORK . . . . . } APPELLANTS;

AND

THE QUEEN ON THE PROSECUTION OF THE MAYOR ALDERMEN AND BURGESSES OF THE BOROUGH OF SHEFFIELD . } RESPONDENTS.

Highway, Repair of—Turnpike Roads ceasing to be such since the 31st of December 1870—*Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77) *s.* 13.

The Highways and Locomotives (Amendment) Act 1878 s. 13 provides for the maintenance of roads which have since the 31st of December 1870 ceased to be turnpike roads.

A provision in turnpike Acts coming into operation before the 31st of December 1870 that turnpike trustees shall not spend money or levy toll upon certain portions of turnpike roads does not prevent such portions of the roads from being still turnpike roads on the 31st of December 1870, within the meaning of sect. 13 of the Highways and Locomotives (Amendment) Act 1878.

So as to an agreement under the Local Government Act 1858 (21 & 22 Vict. c. 98) s. 41, made before the 31st of December 1870 between turnpike trustees and a corporation, under which the turnpikes upon certain portions of turnpike roads were removed and the repair of such portions was undertaken by the corporation:—

So *Held*, affirming the decision of the Court of Appeal.

APPEAL from an order of the Court of Appeal.

By consent the facts were pursuant to Order LXII. rule 3 stated in a special case, of which the material parts were as follows:—

1. This was a rule calling upon the justices of the peace for the West Riding of the county of York to shew cause why a writ of mandamus should not be issued commanding them to pay to the mayor aldermen and burgesses of the borough of Sheffield certain sums in respect of the maintenance of three roads, called the Wakefield and Sheffield Road, the Sheffield and Chesterfield Road, and the Sheffield and Glossop Road, such roads being alleged by the mayor aldermen and burgesses to be main roads within the

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meaning of the 13th section of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77).

2. The justices of the peace of the West Riding of the county of York in general or quarter sessions assembled are the county authority, within the meaning of that Act, for the West Riding, in which the borough of Sheffield (hereinafter called "the borough") is situated.

3. The borough is and has been since 1843 subject to the Municipal Corporation Act 1835, and the Acts amending the same. The Local Government Act 1858 was adopted and came into operation in the borough on the 7th of September 1864, and the borough is now an urban sanitary district within the meaning of the Public Health Act 1875, and the mayor aldermen and burgesses acting by the council (hereinafter called "the corporation") are the urban sanitary authority thereof. Previously to the 24th of September 1880 the borough had no separate court of quarter sessions, and was a highway area for the purposes of the Highways and Locomotives (Amendment) Act 1878.

4. By 58 Geo. 3 c. liv., which remained in force until repealed by the Local Government Supplemental Act 1865 (No. 3), and which was intituled "An Act for cleansing lighting watching and otherwise improving the town of Sheffield in the county of York," certain limits were by sect. 19 assigned to what is therein called "the town of Sheffield," comprehending the area within a boundary line to be drawn round the parish church at the distance of three quarters of a mile in every direction.

5. By 2 Will. 4 c. 64 s. 35 it was enacted that the several cities, boroughs and places specified in the schedule thereto annexed marked "O" should, as to the election of members or a member to serve in Parliament, respectively include the places and be comprised within the boundaries which in such schedule were respectively specified and described in conjunction with the names of such cities, boroughs and places respectively. In the said schedule Sheffield was declared to comprise "the parish of Sheffield." The parish of Sheffield is also the area of the borough of Sheffield comprised within the grant of a charter of incorporation to the inhabitants thereof pursuant to the provisions of the Municipal Corporation Act 1835.

6. In August 1878 when the Highways and Locomotives (Amendment) Act 1878 was passed the lines of buildings continuous, or nearly so, extended beyond the area of the "town" (see par. 4) and up to the limits of the area on the map coloured pink. The remainder of the borough (which included and was much more extensive than the "town") consists of agricultural and moor land.

7. The facts relating to each of the three roads respectively are as follows:—

The Wakefield and Sheffield Road.

8. By a Turnpike Act 6 Will. 4 c. liii. (1836), intituled "An Act for repairing and improving the road from Wakefield to Sheffield in the county of York" for the purpose of more effectually diverting, altering, amending, widening, improving, and keeping in repair a turnpike road leading from the south end of the town of Wakefield to the north end of the town of Sheffield (herein called the Wakefield and Sheffield Road), it was enacted (sect. 40) that such Act should commence and take effect from the passing thereof, and should continue and be in force for and during the term of thirty-one years, and from thence to the end of the then next session of Parliament. The term of that Act was extended by various Acts of Parliament to the 1st of November 1876, when it expired. The portion material in this case of the Wakefield and Sheffield Road extends from G, a point on the boundary of the borough (par. 5) to H, a point within the area of the "town" (par. 4).

9. By sect. 34 of that Act it was provided that no part of the money arising or to be received by virtue of that Act should be laid out in repairing, maintaining or improving any street, highway or place in any part of the towns of Barnsley, Sheffield and Wakefield or any of them, nor should any toll be collected there, anything in that Act contained to the contrary notwithstanding.

10. The portion of the Wakefield and Sheffield Road from the point H to A was made through private lands in pursuance of that Act, and there was no continuous row of houses in 1836 on any portion of the line of that road within the borough. (A was

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a point between H and G and situated beyond the area of the "town" (par. 4).

11. A turnpike gate or toll bar was erected on the Wakefield and Sheffield Road at Pitsmoor at the point A within the borough by the trustees of such road, and tolls were taken thereat, and the portion of the road within the borough (namely from the point G to the point H) was maintained by such trustees until the Turnpike Act, 6 Will. 4 c. liii., expired as aforesaid on the 1st of November 1876. Since that date the said portion of the road has been maintained by the corporation and no tolls have been taken thereon.

12. The expenses now claimed from the justices for the county in respect of this road relate to the portion thereof between G and H.

The Sheffield and Chesterfield Road.

[Paragraphs 13–19 of the case raised a similar question under s. 18 of the Derby, Duffield, Wirksworth and Sheffield Turnpike Road Act 1851 (14 Vict. c. xxxvii.), which provided that no money should be laid out on certain roads within the towns of Derby, Chesterfield or Sheffield, or within the limits of any Act of Parliament passed for the improvement of any town, nor should any tolls be collected therein.]

The Sheffield and Glossop Road.

[The case set out an agreement between the trustees of this road and the corporation of Sheffield under which the turnpike gates on the portion of the road within the borough were taken down on the 1st of July 1870, and since that date no tolls were taken on that road within the borough down to the expiration of the Sheffield and Glossop Act on the 1st November 1875. Since the 1st of July 1870 down to the present time the repairs of that portion of the road have been done by the corporation.]

26. From the 29th of September 1878 to the 25th of March 1880, the corporation incurred expenses in the maintenance of the portions in question of each of the three roads within the borough.

37. The question of law arising in this proceeding is whether the Wakefield and Sheffield Road, the Sheffield and Chesterfield Road, and the Sheffield and Glossop Road, or any of them or any part or parts thereof within the borough, ceased to be turnpike roads or a turnpike road within the meaning of the 13th section of the Highways and Locomotives (Amendment) Act 1878 after the 31st of December 1870 by the operation of the local turnpike Acts.

38. If the Court shall be of opinion that the three roads or any of them or any part or parts thereof so ceased to be turnpike roads or a turnpike road since the 31st of December 1870, a peremptory writ of mandamus is to be issued commanding the county authority to pay to the corporation forthwith one-half of the expenses, so incurred as aforesaid, in the maintenance of such parts of the roads as so ceased to be turnpike roads.

39. If the Court shall be of opinion that no part of the three roads ceased to be a turnpike road after the 31st of December 1870 the rule granted herein on the 24th of November 1880 is to be discharged.

On the hearing of the special case before the Queen's Bench Division and on the hearing of the appeal in the Court of Appeal it was agreed between the appellants and respondents that it should be taken as part of the special case, that on the 30th of December 1870 the lines of buildings contiguous, or nearly so, of the town of Sheffield extended to the limits of the area on the map coloured pink (see par. 6).

The Queen's Bench Division (Lord Coleridge C.J. and Manisty J.) on the 16th of June 1881 made the rule absolute as to all three roads, Manisty J. holding that as to the Sheffield and Chesterfield Road the appellants were not liable, but withdrawing his judgment as to that road in order that there might be an appeal; and Lord Coleridge holding that the appellants were liable as to all three roads.

The Court of Appeal (Brett, Cotton and Lindley L.JJ.) on the 16th of November 1881 affirmed the order of the Queen's Bench Division as to all three roads. The judgments of both Courts below turned mainly upon the construction of the local Acts.

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May 4, 7. Sir *F. Herschell* S.G. and *Forbes* Q.C. (*Darwin* with them) for the appellants:—

The orders of the Queen's Bench Division and the Court of Appeal are erroneous (except as to the appellants' proportion of the expense incurred in respect of that part of the Wakefield and Sheffield Road which lies between G and A, as to which the appellants abandoned their contention in the Queen's Bench Division). As to the Wakefield and Sheffield Road—The road between H and A having become after the passing of 6 Will. 4 c. liii. and before the 31st of December 1870 by reason of the extension of the buildings of the town of Sheffield part of that town, the road between those points had prior to the last mentioned date ceased by virtue of sect. 34 of the Act to be a turnpike road, inasmuch as the road trustees could not lawfully collect toll thereon or repair it. A similar remark applies to the Sheffield and Chesterfield Road. As to the Sheffield and Glossop Road—The portion of the road in question after the 1st of July 1870 ceased to be a turnpike road by reason of the agreement made on that date between the trustees of that road and the corporation of Sheffield under sect. 41 of the Local Government Act 1858, the maintenance and repair of that portion of road having since July 1870 been undertaken and executed by the corporation of Sheffield. It was held in the *Justices of Lancashire* v. *Mayor of Rochdale* (1) that the provisions of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77 s. 13 (2)) applied to a turnpike road as a whole in existence on the 31st of December 1870, and that no part ceased to be turnpike road unless the whole ceased to be. A "turnpike road" has

(1) Ante, p. 494.

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(2) Sect. 13 enacts: "For the purposes of this Act, and subject to its provisions, any road which has, within the period between the thirty-first day of December one thousand eight hundred and seventy and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one half of the expenses incurred from and after the twenty-ninth day of September one thousand eight hundred and seventy-eight by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate. . . ."

been defined to be "a road on which a turnpike is lawfully erected and the public are bound to pay tolls:" per Parke B. *Northam Bridge and Roads Company* v. *London and Southampton Railway Company* (1). As then the right to take tolls on these pieces of road had come to an end before the 31st of December 1870 they were never turnpike roads within sect. 13. Whether that right had ceased as to the Wakefield and Sheffield and the Sheffield and Chesterfield Roads respectively depends on the construction of 6 Will. 4 c. liii. s. 34, which prohibited the collection of tolls in the town of Sheffield, and the similar provisions in 14 Vict. c. xxxvii. ss. 11, 18. Does "town" in those sections mean the town of Sheffield as existing at the dates when they were enacted, or the town in the popular sense (i.e. continuous houses) as it existed from time to time? The latter is the true construction. It is in accordance with the scheme of the Turnpike Acts to exclude streets from the trusts: *Reg.* v. *Cottle* (2); *Collier* v. *Worth* (3); *Elliott* v. *South Devon Railway Company* (4); *Milton* v. *Faversham District Highway Board* (5); *Justices of Lancashire* v. *Mayor of Rochdale* (6). If this view be correct the pieces in question of the Wakefield and Sheffield Road and of the Sheffield and Chesterfield Road were disturnpiked before 1870 by reason of the growth of the town of Sheffield. In the case of the Sheffield and Glossop Road the same result was produced by the agreement of the 1st of July 1870. The corporation having in the one case agreed to take upon themselves the repair of the road, and in each case having under the Public Health Act 1848 (11 & 12 Vict. c. 63) s. 68 to manage and alter the roads as they please, it could not be intended that they should throw the expense on the county.

[LORD BLACKBURN referred to the powers of reducing a main road given by 41 & 42 Vict. c. 77 s. 16.]

Wills Q.C. and *Alexander Glen* for the respondents:—

As to the Wakefield and Sheffield Road—The words "any street, highway or place in any part of the towns of Barnsley, Sheffield

(1) 6 M. & W. 428, 440.
(2) 16 Q. B. 412.
(3) 1 Ex. D. 464.
(4) 2 Ex. 725; 5 Rail. Cases, 500.
(5) 10 B. & S. 548 n.
(6) Ante, p. 494.

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and Wakefield" in sect. 34 of 6 Will. 4 c. liii. are not appropriate words by which to describe a portion of the turnpike road to be made under sect. 4 and have not that meaning, and there is nothing in that section to qualify the express enactment of sect. 4 that the new road to be made under that section (including the part now in dispute) "shall be repaired and maintained by the trustees." The prohibition in s. 34 was not intended to apply to any part of the Wakefield and Sheffield Road, but was inserted ex majori cautelâ to prevent the trustees interfering with streets not subject to their trust. As to the Sheffield and Chesterfield Road—The true construction of sect. 18 of the Derby, Duffield, Wirksworth and Sheffield Act 1851 is that which has been acted upon ever since the passing of the Act, viz. that "town" in that section means the area within the limits of the Act of Parliament then in force for the improvement of the town of Sheffield. As to the Sheffield and Glossop Road—The agreement made on the 1st of July 1870 between the trustees of the road and the corporation of Sheffield had not the effect of causing the portion of the road to which it applied to "cease to be a turnpike road" within the meaning of the Highways and Locomotives (Amendment) Act 1878 s. 13. That agreement does not relieve the turnpike trustees from liability if the corporation do not repair, and cannot therefore disturnpike the road. As to all three roads—No one of them ceased to be a turnpike road within the meaning of the Highways and Locomotives (Amendment) Act 1878 s. 13 (1), until the expiration of the Turnpike Acts affecting them respectively. The *Northam Bridge Case* (2) decided that the expression "turnpike road" includes roads on which turnpikes may be erected, not that it excludes others. Nor is a turnpike road necessarily repaired by turnpike trustees. The primary liability to repair remains on the parish as at common law notwithstanding the Turnpike Acts, and the turnpike funds are usually to be applied first in payment of the mortgage debt and interest, and the surplus alone (if any) to repairs. Any road which is within the body of legislation of the general Turnpike Acts is a turnpike road. Those Acts deal with criminal offences and many other matters besides the

(1) See note (2), ante, p. 786. (2) 6 M. & W. 428; 1 Rail. Cas. 665.

erection of turnpikes, collection of tolls and repair of the roads: *Reg.* v. *Thomas* (1); *Loveridge* v. *Hodsoll* (2); *Reg.* v. *French* (3). The provisions of 41 & 42 Vict. c. 77 s. 13 are intended to apply to a road as a whole: *Justices of Lancashire* v. *Mayor of Rochdale* (4).

Forbes Q.C. replied.

The House took time for consideration.

June 4. LORD BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal, affirming with costs an order of the Queen's Bench Division, directing a peremptory mandamus to issue to the appellants to pay to the mayor, &c., of Sheffield, acting as the urban sanitary authority for that borough, half the moneys expended by them for the maintenance of that portion of the Wakefield and Sheffield Road on the part between the letters G and H on a map; half the expenses incurred by them on the maintenance of that portion of the Sheffield and Chesterfield Road on the part between the letters marked B and I on the said map; and half of the expenses incurred by them on the maintenance of the part of the Sheffield and Glossop Road between the letters F and D on the said map. This order of the Queen's Bench Division was made on a special case.

Much depends on the construction of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) or rather of that part of it relating to main roads. By sect. 13 it is enacted that "for the purposes of this Act, and subject to its provisions, any road which has, within the period between the 31st December 1870 and the passing of this Act (16th August 1878), ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road." And half the expenses of the maintenance of such main road incurred by the highway authority shall, as to every part thereof which is

(1) 7 E. & B. 399.
(2) 2 B. & Ad. 602.
(3) 4 Q. B. D. 507.
(4) Ante, p. 494.

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within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate. Sect. 14: The following areas shall be deemed to be highway areas, amongst others, 1. urban sanitary districts. By sect. 38, highway authority means, as respects an urban sanitary district, the urban sanitary authority; and urban sanitary district and urban sanitary authority mean respectively the districts and authorities declared so to be by the Public Health Act 1875, with an exception as to boroughs having a separate court of quarter sessions, within which exception Sheffield did not at the time in question fall.

The appellants are the county authority, and the borough of Sheffield is a highway district, and the respondents are the highway authority for that district. The three turnpike Acts in question all expired by efflux of time after the 31st of December 1870, the date fixed by the Highways and Locomotives (Amendment) Act 1878, and before the expenses were incurred, and the parts of the roads mentioned were all within the highway district of Sheffield. The only question therefore is whether the parts of the roads in question respectively ever were, or rather whether after the 31st of December 1870 they still were, parts of turnpike roads, within the meaning of the words as used in the Highways and Locomotives Act 1878.

There is a distinction between turnpike roads and parish highways, though turnpike roads are, generally at least, highways, which if the road is not kept in repair out of the tolls, the parish is bound to repair; and there are many enactments in which the legislature has proceeded on the assumption that the traffic on a turnpike road is likely to be more important than that on a parish highway. A good example of this was given during the argument. A windmill is not to be erected within 200 yards of a turnpike road, nor within 50 yards of a highway.

The *Northam Bridge and Roads Company* v. *London and Southampton Railway Company* (1) also illustrates this. The special Act of the railway company required them, when crossing any "turnpike road," to do so by a bridge. The plaintiffs, a trading company, the proprietors of a bridge, owned a bridge and two

(1) 6 M. & W. 428, 433, 440.

roads, on which they were authorized to keep up turnpikes and levy tolls, but subject thereto they were public roads. The railway company proposed to cross these roads by a level crossing, which they had power to do if it was a public highway, not being a turnpike road.

The Vice-Chancellor refused an injunction, thinking that there could not be a turnpike road within the meaning of the Railway Act unless there was a turnpike trust, such as to make it a turnpike road within the General Turnpike Act; but gave liberty to take the opinion of a Court of law on the subject. The Court of Exchequer were of a different opinion. Parke B., after reading the sections of the Railway Act says, "In these enactments the legislature had in view the benefit of the public, and therefore compelled the railroad company in the case of a turnpike road, *where the traffic is greatest*, to afford the public more accommodation by carrying the railroad either above or under the road. The question then is whether this road traversed by the railway is a turnpike road. I think it is. The ordinary meaning of the words 'turnpike road' is a road on which a turnpike is lawfully erected, and the public are bound to pay tolls. If a turnpike road meant a road subject to the general Turnpike Act, I should think, with the Vice-Chancellor, that this is not a turnpike road, because it is not so governed." This case was cited for the sake of the definition of "turnpike road" there given. But I think it even more important as an authority for saying that the legislature acted on the assumption that the traffic on turnpike roads is likely to be greater than on ordinary highways. It could not be supposed that it would always be so; but they legislated on that probability.

I think that in the Highways and Locomotives Amendment Act 1878 the legislature acted on a similar assumption. Their object was to cast half the burden of repairing main roads, that is roads more for the purpose of through traffic than of local traffic, on the county, so far relieving the locality. And assuming that a road from one terminus to another which was a turnpike road was likely to be a main road in that sense, they made that a primâ facie test of what should be a main road. In some cases this might be a fallacious test, and then it may be set right under

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the 16th section. But it was the general test; and, as I think, that must be borne in mind when inquiring what parts of a road regulated by a Turnpike Act are to be considered as turnpike road within the meaning of this enactment.

I will first consider the case of the Wakefield and Sheffield Road. The Turnpike Act in this case is the 6 Wm. 4 c. liii., for repairing and improving the road from Wakefield to Sheffield. It recites certain proposed deviations and alterations in the then existing turnpike road from the south end of Wakefield to the north end of Sheffield. Then by sect. 3 it enacts that the diversions and new lines of road shall when declared complete "be and form part of the said turnpike road leading from Wakefield to Sheffield;" and by the 6th section that certain portions of the present turnpike road shall, as soon as the said new lines and diversions are declared to be completed, "respectively cease to form or be considered as part or parcel of the said turnpike road."

And then comes the 34th section, on which the argument of the appellants is founded, "Provided always and be it enacted that no part of the money arising or to be received by virtue of this Act shall be laid out in repairing maintaining or improving any street highway or place in any part of the towns of Barnsley, Sheffield and Wakefield, or any of them, nor shall any toll be collected there; anything herein contained to the contrary notwithstanding." H is the point at the north end of Sheffield to which the turnpike road from Wakefield proceeded; G is the point at which that road crosses the boundary of the parish of Sheffield with which the borough is now made conterminous. There is a point marked A between H and G where the road leaves the town, in the sense of the contiguous houses, of Sheffield. That boundary was on the 31st of December 1870 considerably further from H than it was in 1836.

It was argued that the part of the road from H to A was in 1870 in the town of Sheffield, and that consequently the turnpike trustees were forbidden to spend money on that part of the road or to levy toll there. I am not able to understand what could be the reason why the legislature should forbid the spending of any money on the portion of the turnpike road which should come to be within the towns named. I can quite easily understand why

it should forbid levying toll on any part of the road which should come to be in a town. But I will assume (what I do not decide) that the legislature have, for whatever reason, said that the trustees shall neither spend money nor levy toll on any portion of the turnpike road from Wakefield to Sheffield which should at any future time be within the ambit of the contiguous houses forming the towns of Sheffield, Barnsley and Wakefield. Would that prevent those portions from being part of the turnpike road from Wakefield to Sheffield within the meaning of the Highways and Locomotives Amendment Act 1878 s. 13?

If the words used had been like those of sect. 6, that those portions should cease to form or be part of the turnpike road, I should have thought so. The portion of the road which had been, by plain and express terms, made part of the turnpike road would, by equally plain and express words, be made to be no longer part of it. But when we are construing an Act of Parliament in which the legislature have said that, when a turnpike road is made from one terminus to another, they will assume that it is a main road, that is a road for carrying through traffic from, in this case, Sheffield to Wakefield, I cannot think that a portion of that road is to be considered as no longer part of that turnpike road merely because no turnpike is to be erected on that part. The portion of the road through Taunton in *Reg.* v. *Cottle* (1) certainly did not cease to be part of the turnpike road when the toll-bar was removed beyond the outskirts of the town. There the trustees continued to spend money on the portion of the road within the town; here they are forbidden (according to what I assume to be the construction) to do so; but that does not in my mind prevent that which was part of the turnpike road from continuing to be part of it, or afford any argument for saying that this fragment of the turnpike road is the less to be a part of the main road. It does afford an argument in favour of saying that it is no longer under the turnpike trust: but I agree with the Court of Exchequer and differ from the Vice-Chancellor in thinking that that is not the test.

This is not the reason, I think, of the judges below, and that makes me distrust its soundness: but after consideration I think

(1) 16 Q. B. 412.

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it is sound, and advise your Lordships to affirm this order so far as relates to this road.

Precisely the same reasons apply to the Derby and Sheffield Road and the effect of the 18th section of 14 Vict. c. xxxvii.; and for the same reasons I think the judgment in that case also should be affirmed.

As to the Glossop Road it depends on the effect of an agreement made between the road trustees and the town of Sheffield under 21 & 22 Vict. c. 98, s. 41, by which the turnpikes were removed, and the repair of the road was undertaken by the town before the last day of December 1870. I can only express my agreement with what Lord Coleridge says in the Court below. There is nothing expressed, and I think nothing implied, in the Acts of Parliament to say that such an agreement shall make the portion of the turnpike road with regard to which such an agreement is made cease to be part of the road.

I therefore think that the judgment should be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I concur with the noble and learned Lord who has just spoken, both as to the true construction of the 13th section of the Highways and Locomotives Amendment Act of 1878, and as to the application of its enactments to the three roads in question; but having had an opportunity of considering in print the judgment of the noble and learned Lord, and finding there all the reasons which have led me to form that opinion, I think it unnecessary to add anything to what he has said.

LORD FITZGERALD:—

My Lords, I concur in the decision that has been announced by the noble and learned Lord on the woolsack (Lord Blackburn) as to all the three cases brought before us on this appeal.

As to the first road, viz., the Wakefield and Sheffield Road, the question raised affects only the liability of the county as to the portion of that road between A and H. The Sheffield Act of 1818 by its 19th section defines the limits and boundaries of

Sheffield for the purposes of this Act, represented by the part shaded yellow on the map forming part of the case. Then came the Act of 1836 for repairing and improving the road from Wakefield to Sheffield. At the time of the passing of that Act the boundaries and limits of Sheffield remained unaltered save as affected for parliamentary purposes only by the Act 2 Will. 4 c. 64.

The portion of the Wakefield and Sheffield Road now the subject of controversy is a new bit of road constructed under the Act of 1836 in substitution for another portion of the same road. Sects. 3 and 4 of the Act of 1836 provide that this new piece shall become and be and form part of the turnpike road leading from Wakefield to Sheffield and shall be repaired and maintained by the trustees; and sect. 6 provides that the old part of the road, for which the new piece is so substituted, shall cease to be part of the said turnpike road. We have here therefore the clearest declaration that the new piece of road, now marked on the map as from A to H, became part of the turnpike road, subject to its trusts, and to be repaired by the trustees, and it is stated as a matter of fact that it was kept in repair by the trustees down to the expiration of the trust in 1876, when the whole line of road from Wakefield ceased to be a turnpike road in the sense that the Act which constituted it came to an end on the 1st of November 1876. The whole of that road, including the piece as to which the controversy arises, came within the 13th section of the Act of 1878.

The appellants however rely on sect. 34 of the Act of 1836, the potent effect of which is such, they allege, that the piece of road from A to H never was turnpike road maintainable by the trustees, or, if it was, it ceased to be such as soon as it became a street of the town of Sheffield by being built on at both sides. "The town of Sheffield" in the 34th section would seem to me to mean the town as defined and limited by the Act of 1818, and it did not then embrace the district from A to H: and, if so, sect. 34 would at that time have no application to it: but if we give it a more elastic construction, and treat it as applying to what should be known from time to time popularly as the town of Sheffield;—that is Sheffield as it enlarged its limits by

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continuous building,—in that sense Sheffield in 1870 did extend up to A.

The 34th section, which has caused so much doubt, enacts as follows: "That no part of the money arising or to be received by virtue of this Act shall be laid out in repairing, maintaining, or improving any street, highway, or place in *any* part of the towns of Barnsley, Sheffield, and Wakefield, or any of them, nor shall any toll be collected there; anything herein contained to the contrary notwithstanding;"—and the difficulty of putting any reasonable construction on it has been very great indeed. Whether your Lordships adopt the view of that section taken by the Queen's Bench Division, and by the Court of Appeal, or adopt generally the reasons of the noble and learned Lord (Lord Blackburn) the construction is fatal to the argument of the appellants.

I am unable to adopt the view that the legislature intended by sect. 34 to undo what had been done by sects. 3 and 4, and to take out of the turnpike trust parts of the new roads and diversions which it had by these sections declared should become and form parts of the said turnpike road and be accordingly repaired and maintained by the trustees. Sect. 34 is a finance clause, and deals with the application of the money to be received for tolls; sect. 5 expressly empowers the trustees to erect toll-bars and gates on the new lines and extensions:—and sect. 21 authorizes the taking of the statutable tolls at these new toll-gates or toll-bars when erected. It also deserves attention that one of the new lines or diversions is to commence at the Market Place of Barnsley, which is a place in that town.

I should, in preference to the construction which the appellants contend for, read sect. 34 so as to restrain its operation to matters not within sects. 3 and 4, and so as not to defeat their operation, or as a provision inserted ex abundanti cautelâ lest the trustees mistaking their duties should expend the trust money on any highway or place in any of the towns named other than the road for which, from end to end, provision is made by the statute. The practice of the trustees has been for forty years in accordance with this construction. "Abundans cautela non nocet" is an old maxim of the law.

I am of opinion that this Sheffield and Wakefield Road as to the part in question comes decidedly within the provisions of sect. 13 of the Act of 1878, and that there is nothing to take it out of its operation, and that its consequences follow.

As to Nos. 2 and 3, the Derby and Sheffield Road, and the Glossop Road, I have no difficulty in adopting the judgment of Lord Coleridge in the Court below.

I have only to add that your Lordships' decision in the present case does not militate against your Lordships' prior decision in *Justices of Lancashire* v. *Mayor of Rochdale* (1).

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 4th June 1883.

Solicitors for appellants: *Badham & Williams* for *W. L. Williams, Wakefield.*

Solicitors for respondents: *Richard Smith & Wilmer* for *John Yeomans, Sheffield.*

(1) Ante, p. 494.

[HOUSE OF LORDS.]

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GEORGE ROBINSON . . . . . APPELLANT;

AND

THE LOCAL BOARD FOR THE DISTRICT OF BARTON-ECCLES, WINTON AND MONTON . . . . . RESPONDENTS.

Public Health Act 1875 (38 & 39 *Vict. c.* 55) s. 157—*Urban Authority—New Street, Level, Width and Construction of—Bye-laws under* s. 157.

The Public Health Act 1875 (38 & 39 Vict. c. 55) s. 157 enables an urban authority to make bye-laws with respect (inter alia) to the level, width and construction of new streets:—

Held, affirming the decision of the Court of Appeal, that the words "new streets" in that section are not confined to streets constructed for the first time, but apply also to an old highway, formerly a country lane, which has long been a "street" within the interpretation clause (sect. 4) of that Act, and which by the building of houses on each side of it has recently become a street in the popular sense of the term.

A bye-law made by an urban authority under that section provided that every new street should be laid out and formed of such width and at such level as the urban authority should in each case determine:—

Held, reversing the decision of the Court of Appeal, that "width" in s. 157 of the Public Health Act 1875 and in the above bye-law meant width of roadway, and not width between houses on each side of the street; and that the urban authority were not entitled under the above bye-law (or any other of their existing bye-laws) to disapprove of and pull down houses in the course of erection in a new street on the ground that the building line was too near the roadway.

APPEAL from an order of the Court of Appeal (Jessel M.R. Brett and Cotton L.JJ.), reversing a decision of Fry J. The facts are stated at length in the report of the decisions below (1), and concisely in the judgment of the Lord Chancellor in this House.

June 28, 29. *M. Cookson* Q.C. and *Byrne* for the appellant:—

The roadway is not a "new street" within the Public Health Act 1875 (38 & 39 Vict. c. 55) s. 157, for it was a "street"

(1) 21 Ch. D. 621.

within the interpretation clause s. 4. Nor is it a "new street" within 21 & 22 Vict. c. 98 (Local Government Act 1858) s. 34. To make a new street the rows of houses must be continuous: *Reg.* v. *Fullford* (1). The cases relied on by the respondents below are not in point. Private property is not to be presumed to be taken away, except so far as is expressly enacted by statute. If the bye-laws mean what the respondents allege (which they do not, for none of them are here infringed) they exceed the board's power to make. Part 3 "Sewerage and Drainage" of the Public Health Act 1875 sects. 13–26 shew that something quite new is intended by "new street" as used in sect. 157. "Width" means width of roadway, not width between the two rows of houses.

Rigby Q.C. and *Buckley* for the respondents:—

The decision of the Court of Appeal was right. The decisions in *Pound* v. *Plumstead Board of Works* (2) and *Dryden* v. *Overseers of Putney* (3) are decisive as to the meaning of "new street." "Width" of street means width from house to house, not merely width of carriage or road way. Even if the 1st bye-law did not entitle the respondents to disapprove of and pull down the buildings, the 42nd does. *Baker* v. *Mayor of Portsmouth* (4) is in favour of the respondents. [They also referred to *Galloway* v. *Mayor of London* (5), *Kerr* v. *Corporation of Preston* (6), and *Sawyer* v. *Paddington* (7).]

EARL OF SELBORNE L.C.:—

My Lords, in this case your Lordships, I think, all differ from the judgment which is now under appeal. It is satisfactory to observe that every one of the learned judges who concurred in that judgment felt the difficulty of the case; and some of them at all events used words expressing that they had in the course of the argument considerable doubt as to the proper decision to be arrived at. If, therefore, your Lordships differ from those learned

(1) Leigh & Cave C. C. R. 403; 33 L. J. (M.C.) 122.
(2) Law Rep. 7 Q. B. 183.
(3) 1 Ex. D. 223.
(4) 3 Ex. D. 4, 157.
(5) Law Rep. 1 H. L. 34, 55.
(6) 6 Ch. D. 463.
(7) Law Rep. 6 Q. B. 164.

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judges it is in a case in which they themselves have stated that different minds may well come to different results.

The only facts upon which, I think, the case turns are these:— There is at Patricroft in the neighbourhood of Manchester a public highway called "New Lane," on each side of which within the last ten years a considerable number of houses, not all continuous, have been built; and the present appellant proposed to build a row of nine houses fronting upon that public highway. The local board, the urban authority under the Public Health Act, have objected to his right to do so, and have asserted the right to remove those houses if built otherwise than in the line set back from the roadway which they have defined. The question in the special case is whether they have power to do so. If they have that power it must be contained in the provisions of the Public Health Act of 1875; and it is admitted that the only provision in that Act which could authorize what they have taken upon themselves to do is the provision as to bye-laws contained in the 157th section. "Every urban authority may make bye-laws with respect to the following matters (that is to say")— then follow four sub-sections, the first of which is in these words, "With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof."

Now if this particular lane is not a new street within the meaning of the Act (and that was the opinion of Fry J. in the Court below) the case of the respondents would necessarily fail. If it is a new street within the meaning of the Act, then the question would be whether they could make and have made a bye-law or bye-laws sufficient to authorize what they are endeavouring to do. Fry J. thought that the words "new street" were not applicable to a highway which by the interpretation clause of the Act might be included within the meaning of the word "street" as used in the Act. The words of the interpretation clause (sect. 4) on that subject are these: "'Street' includes any highway (not being a turnpike road), and any public bridge (not being a county bridge,) and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

I cannot help thinking that so far the Court of Appeal were right; and I respectfully differ on this point from Fry J. in

holding that those words do not necessarily control the meaning of the words "new street" when afterwards found in the course of the Act. I agree with an observation which was made in *Baker* v. *Mayor of Portsmouth* (1) by Huddleston B., in which he said, after reading the words of the interpretation clause of the Public Health Act 1848 (11 & 12 Vict. c. 63 s. 2) which was in similar terms, "What is the meaning of 'shall apply to and include,' unless 'street' means something more than the roadway, that is to say, the street with the houses? That really seems the reasonable and proper interpretation of the word 'street.'" As I understand those words they mean this: The interpretation clause has said that (when there is nothing in the context to exclude it) the words shall be applicable to a mere highway, on neither side of which are houses. That is very true. But, he says, what is the use of saying it "shall apply to and include," unless in its natural sense (which there is nothing here to limit or restrain) it might be held not to apply to and not to include a mere highway without houses on each side? An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable. I look upon this portion of the interpretation clause as meaning neither more nor less than this, that the provisions contained in the Act as to streets, whether new streets or old streets, shall, unless there be something in the subject-matter and the context to the contrary, be read as applicable to these different things. It is perfectly consistent with that that they should be read as applicable, and should be applied, to those things to which they in their natural sense apply, and which do not require any interpretation clause to bring them in; and in the natural and popular sense of the word "street," or the words "new street," I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must, or may be continuous or discontinuous); and by "new street," a place which

(1) 3 Ex. D. 13.

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before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it.

That I think would be, according to the sound principle of construction, reasonable; and I also think that it is so determined by authority, because in *Pound* v. *Plumstead Board of Works* (1) and also in *Baker* v. *Mayor of Portsmouth* (2) the Courts have held that such is, in point of fact, the proper construction of the words. If, therefore, your Lordships differ from the decision of the Court of Appeal, it is not upon the ground which was adopted by Fry J.

But, when we have arrived at that result, we have still to give effect to the words of the empowering clause that "bye-laws may be made with respect to the following matters." The manner of making bye-laws is this; they must be made by the local authority, the urban authority, and they must be approved by the Local Government Board. The mere act or volition of the urban authority is not sufficient, it must receive the sanction of the central authority also.

Cotton L.J. appears to have thought that in this case the 42nd bye-law had an effect so large, that, if that view were correct, it would doubtless dispose of the case in the respondents' favour. The 42nd bye-law is this: "The local board shall by their order approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices thereof, and the owner or person intending to erect any new street or building shall give the notices hereby required, and if any owner or person shall construct any works contrary to the provisions herein contained, the local board, after calling upon such owner or person to shew cause why the works so constructed should not be removed, altered, or pulled down, may if they think fit have such works removed, altered, or pulled down." That is the power which they have assumed a right to exercise in this case; and beyond all doubt they had before them, under another bye-law (the 37th), detailed plans and block plans of the buildings which the present appellant proposed to erect. If the true meaning and effect of the 42nd bye-law is that they might, for any reason whatever, put a veto upon the plans which came

(1) Law Rep 7 Q. B. 183. (2) 3 Ex. D. 4, 157.

before them and say that the thing should not be done, and remove the thing if done when disapproved by themselves, and if the Act really did enable them to make such a bye-law giving them such an absolute power, then no doubt they are justified in what they have done in this case. But upon the very face of this 42nd bye-law it is tolerably plain, that what is really meant is not an absolute or arbitrary power of disapproval; because the words which introduce the power of removal and destruction are, "and if any owner or person shall construct any works contrary to the provisions herein contained," which certainly do not mean contained in that bye-law alone, but contained in the whole body of bye-laws. Those words, therefore, alone, in their natural sense, are equivalent to "anything contrary to these bye-laws." And that this is the true meaning appears to me to be, upon the face of the bye-laws, abundantly clear, from the general heading No. 5, which precedes these particular bye-laws and comes immediately before bye-law 36. That heading is as follows: "As to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board of health, and as to the power of the local board of health to remove, alter, or pull down any work begun or done in contravention of such bye-laws." On the face of the bye-laws, therefore, it is clear to me that the 42nd bye-law does not mean to give an arbitrary and absolute power to disapprove for any cause whatever, to forbid the building and remove it, but that it means a power to disapprove on the ground that it would be contrary to some bye-law, and if it is in contravention of any bye-law, then to remove it. And if there could be a doubt about that on the face of the bye-laws, that doubt would, I think, be entirely removed by comparing it with sect. 158 of the Public Health Act, 1875, which directly gives the power to destroy and to remove under those circumstances; for the language of the bye-law follows the language of that clause. That clause says: "Where a notice, plan, or description of any work is required, by any bye-law made by an urban authority, to be laid before that authority, the urban authority shall, within" a certain time, "signify their approval or disapproval" (the very words of the 42nd bye-law) "of the intended work to the person proposing to execute the

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same; and if the work is commenced after such notice of disapproval or before the expiration of such" time "without such approval, and is in any respect not in conformity with any bye-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed." It is therefore, in my opinion, indispensable, in order to justify the course which the respondents have assumed to take, that they should be able to shew that the prohibition which they have sought to impose upon the appellant is authorized by a bye-law which, if the appellant disobeyed that prohibition, would be contravened.

We now come to the Act; and we must consider the subjects on which bye-laws may be made, namely, "with respect to the level, width, and construction of new streets." We have it ascertained that this is a new street; and I take first the last of those three words, "level, width, and construction," for the purpose of shewing that no bye-law as to construction has been made which touches this case. Whether it might have been made is not the question before your Lordships. I will assume, for the argument's sake (and of course for that purpose only) that it might have been made; but that no bye-law under the head of "construction" has been made, which touches this case, appears to me to be perfectly clear. Now *Baker* v. *Mayor of Portsmouth* (1), and some dicta of Lord Chelmsford's in *Galloway* v. *Mayor of London* (2), were cited to shew that for the purpose of bye-laws with respect to the construction of new streets, you may take into account, as fit to be regulated by those bye-laws, not merely the roadways or footways of the streets but the buildings erected or to be erected on each side of them—the whole construction—every part of those buildings external and internal. I assume those authorities to have been rightly decided; and I find accordingly that in this particular set of bye-laws there are a large number which deal with that subject of construction. I begin with the 3rd and the 4th, both of which relate to the construction of the roadways and the footways. That is under the head of "construction." Then follow the bye-laws from 5 to, I think, 34 inclusive (a large number), which relate to the

(1) 3 Ex. D. 4, 157. (2) Law Rep. 1 H. L. 34, 55.

construction of houses on each side, laying down minute and, I assume, proper regulations as to the strength of the materials, as to the dimensions of rooms, and a number of other matters, regulating them with great precision and care. And if, in the plans which were delivered under the 37th bye-law, there had been any contravention of any one of those bye-laws with regard to any part of these intended buildings, I assume that the bye-laws would have been valid, and that there would have been sufficient ground for the exercise, in case of need, of the power to remove and to destroy the buildings. But not one of those provisions applicable to the subject of construction touches directly or indirectly this particular case.

Well, then, I pass from "construction" and come to the word "level." To what does "level" apply? In the course of the argument (I speak without any disparagement of Mr. Rigby, with whose ability we are very familiar), it was said, and most truly, by Mr. Buckley, who put everything clearly and concisely in the best way in which it could possibly be done, that the word "street" is, in different contexts of this Act and of other Acts in pari materiâ, used in different senses. It was pointed out, and truly, that in s. 149 of this Act, and the sections which follow it, the word "street" manifestly has the same sense as when we speak of a man going out of his house into the street, or carriages passing along the street. There the public highway, whether footway or carriageway, is alone intended, and the houses on either side are certainly not included, in that case, in the street. And I should be inclined myself to say that this would primâ facie be the sense of the word "street" when it is used in a context which contains no indication of anything more. We have already seen that for the purpose of "construction" it may include more; it may include the houses which bound the street, and even their internal construction. But a tertium quid was suggested in argument, which is neither the one nor the other of those things, namely a measurement from the external wall of the house, as distinct from its curtilage, on one side of the street to the external wall of the opposite house (if there is one) upon the other side. Now that is a sense of which I find no example whatever. Regarding it as a public highway, there

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certainly could not, in a town like London, be a public highway which would include the areas of the houses on either side, much less the interior of the houses themselves, which for the purpose of "construction" are to be taken into account; and when you have to make a measurement which excludes the houses, I apprehend that the natural and primâ facie sense of the word "street" for the purpose of such a measurement is the roadway, that which is dedicated to the public.

With regard to "level" it was hardly disputed that that must be so. Nobody imagines that the provisions of this Act or of this first bye-law as to level have reference to anything but the public highway, namely the carriageway and the footway. But if that is true of "level" (and it was not really disputed) then this 1st byelaw, which is the only byelaw on the subject, speaks of width and level uno flatu with reference to the same subject. "Every new street shall be laid out and formed of such width and at such level as the Board shall in each case determine." It appears to me that it would be a very extravagant thing to read that as meaning a street in one sense as to width and in another sense as to level. And I am confirmed in that view by the three bye-laws which follow: "Every such new street shall be formed of such level as to be as nearly as practicable even with every street and road to which it shall join or with which it shall communicate;" and, "The footway on each side of every such new street shall be three inches above the channel, shall be flagged in a good and substantial manner," &c.; and "the carriageway of every such new street (being a carriage road) shall be paved" in a certain manner. All those three bye-laws, beginning with a reference to the first, and with the words "Every such new street," plainly have reference to the highway alone, the footway and the carriageway; and if so, how can it possibly be thought that in the first bye-law "width" is applied to a different subject from "level"?

I am confirmed in that view by comparing the word "width" as used in the 157th section of this Act, which authorizes bye-laws, with the word "widening" as used in the 154th section. The argument on the other side is that you may make a bye-law saying that a street shall be of a certain width, which is to be

measured to the front of the house without reference to anything which may intervene between it and the footway or roadway; and at the same time it is admitted that having done that, the public get no benefit whatever, in the shape of any right of passage over that part of the so-called width which is private ground, and that you must have recourse, if you want to give them that benefit, to the 154th section, which enables you, for the purpose of improving any street, to take land. But then you must pay for it. If the street is already of a certain width you may want to widen it; but it is not of a certain width for any purpose useful to the public unless the public can pass over it.

It is not necessary to say more upon that subject; but if more had needed to be said I might refer (as I did in the course of the argument) to a clause in pari materiâ in the Towns Improvement Clauses Act of 1847 with regard to this very subject-matter. Some of the clauses of that Act, though not this clause, are incorporated in the Public Health Act. With regard to new streets there is the following clause in the Towns Improvement Act (10 & 11 Vict. c. 34 s. 63): "It shall not be lawful to make or lay out any new street unless the same be of the prescribed width, or, where no width is prescribed, unless the same, being a carriage-road, be at least thirty feet wide, or, not being a carriage-road, be at least twenty feet wide." Cotton L.J., one of the learned judges whose judgment is now under appeal, said, in *Baker* v. *Mayor of Portsmouth* (1), what I entirely agree with, namely, "Looking at the words 'level and width,' primâ facie they refer, no doubt, to the roadway." I do not collect that Cotton L.J. was of any different opinion in the present case. He, however, thought that the large words about approval or disapproval in the 42nd bye-law would authorize that which is proposed to be done by the local board. In that I respectfully differ from him.

There is very little more which I think it necessary to say. The 156th section of the Public Health Act certainly cannot be appealed to in order to justify what has been done in the present case, even if the carrying forward of any building beyond the line of the neigbouring buildings on each side would be subject to the penalties mentioned in that clause. On that subject I

(1) 3 Ex. D. 162.

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think it unnecessary to say anything. That might or might not have been material if a bye-law to regulate the building line under such circumstances as those of the present case had been made; but no such bye-law having been made, that clause is not the foundation of the action which is now in question, and may be passed over except for this purpose, that with regard to that subject of a building line as distinct from the width of the roadway, there are in the Act several clauses which shew that it is not a matter which the legislature have overlooked, nor a matter which they identify with the power to make orders as to width. The 155th section enables the urban authority to prescribe the line in which a building is to be rebuilt when it has been taken down; the 156th is in pari materiâ about not advancing or bringing forward a building beyond the front wall of the building on either side; and the 160th section enacts that the provisions of the Towns Improvement Clauses Act are to be incorporated with regard, inter alia, "to improving the line of the streets and removing obstructions." That applies to a different subject, specifically mentioned.

Whether on that subject bye-laws might or might not have been competently made, it is not necessary now to inquire, because it has not been done. But without having made such a bye-law, and having no such bye-law to appeal to (of course if such a bye-law had been proposed it could only have been made with the concurrence of the central authority) the local board has taken upon itself to define a building line, and it has expressed in writing the ground of its disapproval of the plan which was submitted to it, that it is "disapproved on the ground that the houses will contravene building line and will be built within the line of the existing buildings on that side of street." It is manifest that it was not with any view of the meaning of the word "width" as applied to the street, or of the bye-law on the subject of width, that this was done, it was under the impression that they could prescribe a building line in a case in which they had no bye-law on that subject. I think that they could not do so.

Therefore, in my judgment, the three questions should be answered by your Lordships in this way. The judgment under appeal should be reversed, and we should say, 1, that New Lane

is, in our opinion, "a new street within the term 'new street' as used in the Public Health Act 1875;" 2, that "the defendant board is not entitled to disapprove of the plaintiff's proposed new buildings on the ground that the intended building line is too near the roadway of New Lane," and 3, that "the defendant board is not entitled to pull down the new buildings so in course of erection;" and I think that the costs ought to be given to the appellant. I move your Lordships accordingly.

LORD BLACKBURN:—

My Lords, I am of the same opinion. Three questions are asked under this special case, the first of which is, "Whether New Lane or whether the part thereof where the plaintiff proposes to build is a new street within the term 'new street' as used in the Public Health Act 1875." On that question we have the facts stated in the special case, and I gather from them that New Lane (which is rather a misnomer, for it is an old lane), was an ancient highway which came within the definition of "street" in the interpretation clause, I think, originally of the Act of 1848, because it was a highway (not being a turnpike road). There have grown up within the last ten years a quantity of houses, of which I will only say that there is enough congruity to say that this part has become a street in the popular and ordinary sense of the word, namely, a highway with houses on each side, and consequently that this part has become a new street. I have not time to criticise the reasons of Fry J. for thinking the contrary. I simply say that that is my opinion, and therein I agree with the Court of Appeal.

But then comes the further question, had the local board a right to pull down these buildings because they were in contravention of a bye-law? Now that the plaintiff had given a written description of what he was going to do is certain; and on that the board wrote, "Disapproved on the ground that the houses will contravene building line, and will be built within the line of the existing buildings on that side of street." Had they any right to disapprove upon that ground? Does the Act prescribe that a house must be built according to any "building line" selected by the board, or that it shall not be "within the line of

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the existing buildings on that side of the street?" The sections which have been referred to shew that when dealing with old buildings, buildings that already exist but which are about to be pulled down in order to be rebuilt, or altered, or advanced, the legislature have provided for a building line, which is the line of the existing buildings on that side of the street. That renders it very likely indeed that the legislature would, if they had thought of it, have passed a provision giving power to do something in a new street where there were no buildings; and that would not have been unreasonable. But the legislature have not themselves done so, nor have the board with the sanction of the central authority made any bye-law which gives them the power. It is not pretended that there is anything in terms giving it. It was argued with great ingenuity, but not to my mind with much success, that although they had not in terms said that there should be a building line, yet inasmuch as they had in their first bye-law said, "Every new street shall be laid out and formed of such width and at such level as the board shall in each case determine," that by implication meant that there should be a building line. I have not time to examine that proposition further than to say that I thought it was a very ingenious fallacy, but a complete fallacy. I simply say that to my mind the board were not entitled to make a disapproval, because there was no such bye-law. I think that the idea of Cotton L.J. and I think of the present Master of the Rolls, then Brett L.J., was that the 42nd of these bye-laws gave the board power to disapprove for any reason or for no reason. I think it really comes very nearly to that. If the bye-law had meant that, I certainly should have been inclined to think that the bye-law was entirely ultra vires; but it is not necessary to say that, because I am clearly of opinion that that 42nd bye-law, when it is looked at, does not say so; it simply says that if there is a disapproval on the ground that what is proposed contravenes some of the previous provisions they may disapprove it in that way; and the consequence would follow that they might order the building to be pulled down. If there is no power to disapprove upon the ground stated (and I have already said that I think there is no power to disapprove on that ground) it follows that the third question must also be

answered against the defendants and in favour of the plaintiff. That is the important one as far as the interests of the parties and the costs are concerned.

I therefore agree entirely in what was said by the Lord Chancellor as to the mode in which the three answers should be altered and also as to the costs. While I do not mean to express an opinion that a bye-law prescribing a building line would have been ultra vires I am not to be understood to express any final opinion that it would have been binding. That point may be decided when it arises.

LORD FITZGERALD:—

My Lords, I entirely concur with all that has fallen from the Lord Chancellor and from my noble and learned friend (Lord Blackburn). There is one point upon which I have no doubt and that is, that the plaintiff in the case not having contravened any of the provisions contained in these rules or bye-laws, or in the statute, the defendants are not entitled to pull down these buildings. At this late hour there is no time to say more.

Order appealed from reversed: declaration that the first question stated for the opinion of the Court in the special case ought to be answered in the affirmative, and the second and third questions in the negative, and that the costs of the special case and of the action ought to be borne by the respondents: the respondents to pay the costs of this appeal and of the appeal in the Court below: cause remitted to the Chancery Division.

Lords' Journals 29th June 1883.

Solicitors for appellant: *Byrne & Lucas* for *Taylor, Kirkman & Colley, Manchester.*

Solicitors for respondents: *Le Riche & Son* for *Cobbett, Wheeler & Cobbett, Manchester.*

[HOUSE OF LORDS.]

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WILLIAM TINDAL ROBERTSON AND ELIZABETH ANNE HIS WIFE . . . } APPELLANTS;

AND

HERBERT JOHN BROADBENT AND OTHERS AND THE ATTORNEY-GENERAL . . } RESPONDENTS.

Will, Construction of—Specific Legacy—Residuary Bequest.

A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to E. A. Robertson absolutely. And he gave and devised all the rest, residue and remainder of his estate, both real and personal, to his executors upon certain trusts; all the legacies to be free of legacy duty; the legacies for charitable purposes to be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes and preferably to any other payment thereout:—

Held, affirming the decision of the Court of Appeal, that the legacy to E. A. Robertson was not specific, and not exempt from the payment of the pecuniary legacies.

APPEAL from an order of the Court of Appeal (1).

Henry Ovey, by his will dated the 1st of June 1881 appointed John Barrow and John Herbert Greenhalgh (two of the respondents) executors and trustees, and after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving to various individuals and charities various sums amounting to £48,600, proceeded thus:—

"I give all my personal estate and effects of which I shall die possessed, and which shall not consist of money or securities for money, unto the said Elizabeth Anne Robertson, for her own use and benefit absolutely. I give and devise all the rest, residue, and remainder of my estate, both real and personal, whatsoever and wheresoever, to the said John Barrow and John Herbert

(1) 20 Ch. D. 676.

Greenhalgh, upon trust, thereout in the first place to pay to Alfred Greenhalgh, of 30 Holborn, London, the sum of five hundred pounds sterling, and to R L Bloomfield of Brighton, aforesaid, secretary to the said Tindal Robertson, the sum of one hundred pounds sterling, for the use of his school, in such manner as he shall think fit in his uncontrolled discretion. And as to the residue thereof, or such part or parts thereof as may lawfully be appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion shall think fit. I direct that all the legacies given by this my will shall be paid free of legacy duty. And also that the aforesaid money legacies for charitable purposes shall be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes and preferably to any other payment thereout."

The testator having died, this action was brought by Broadbent and others of the respondents against the executors for the administration of his real and personal estate. The pecuniary legacies amounted to £49,200, of which £7500 were in favour of charitable institutions. The personal estate was valued under £39,660, and the real estate at about £20,000.

Upon a summons for the re-delivery to the executors of certain chattels which had been given up to the appellant, Elizabeth Anne Robertson, Fry J. being of opinion that the legacy to her of all the testator's personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, was a specific legacy, made no order except as to costs.

On appeal, the Court (Jessel M.R. Lindley and Holker L.JJ.) (1), made an order dated the 3rd of May 1882, declaring, inter alia, that the legacy was not specific, and that all the pecuniary legacies were payable in full before Mrs. Robertson could be entitled to anything under the bequest to her; without prejudice to any question as between her and the testator's heir-at-law as to the liability of the real estate to the payment of such pecuniary legacies in priority to the property bequeathed to her.

(1) 20 Ch. D. 676.

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June 19. *Macnaghten* Q.C. (*Decimus Sturges* with him) for the appellants:—

The will is plain, simple and intelligible, though not so considered by Jessel M.R. The gift in question to E. A. Robertson of all the testator's personal estate and effects not consisting of money or securities for money is in the nature of a specific bequest. The test is, Are there deductions from it? If not it is specific. There are none. The direction to pay debts amounts to a charge of the debts upon the real estate. The gift of residue to the executors is the real residuary bequest. The intention to exonerate the legacy to E. A. Robertson is as plain as it would have been if the testator had specifically enumerated all the articles thus bequeathed to her. The Court below devoted too much attention to *Bothamley* v. *Sherson* (1) and the definition of a specific legacy, and did not sufficiently consider the intention of the testator. A gift of the residue means what is left after something is taken out; viz. the preceding gifts. As to the intention to exonerate see *Spong* v. *Spong* (2); *Conron* v. *Conron* (3); *Lance* v. *Aglionby* (4); *Bootle* v. *Blundell* (5); *Stephenson* v. *Heathcote* (6); *Greville* v. *Browne* (7).

Fischer Q.C. (*Stirling* with him) for the pecuniary legatees, respondents, referred to *Giles* v. *Melsom* (8); *Purse* v. *Snaplin* (9); 1 Rop. Leg. 242 (4th edition); *Stephenson* v. *Dowson* (10); *Kirby* v. *Potter* (11); *Fairer* v. *Park* (12); *Allan* v. *Gott* (13); *Jones* v. *Bruce* (14); *Nisbett* v. *Murray* (15).

Cecil Russell (with him Sir *H. James* A.G.) for the Attorney-General, respondent, cited *Ouseley* v. *Anstruther* (16).

Borthwick for the executors, respondents, was not heard, the House hearing only two counsel for the respondents.

(1) Law Rep. 20 Eq. 304, 308, 309.
(2) 3 Bli. (N.S.) 84; 1 Dow (N.S.) 365.
(3) 7 H. L. C. 168.
(4) 27 Beav. 65.
(5) 1 Mer. 193.
(6) 1 Mer. 224, 226, n., 230.
(7) 7 H. L. C. 689.
(8) Law Rep. 6 H. L. 24.
(9) 1 Atk. 414.
(10) 3 Beav. 342.
(11) 4 Ves. 748.
(12) 3 Ch. D. 309.
(13) Law Rep. 7 Ch. 439, 442.
(14) 11 Sim. 221.
(15) 5 Ves. 149.
(16) 10 Beav. 453.

Macnaghten Q.C. replied.

The House took time for consideration.

July 23. EARL OF SELBORNE L.C.:—

My Lords, the question on this appeal is whether the general personal estate of the testator, Henry Ovey, given to the appellant, Mrs. Robertson, is exempt from or subject to the payment of pecuniary legacies.

The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is, that they are payable by the legal personal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will they are not payable out of the real estate.

The principle of the exemption of personal estate specifically bequeathed is, that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally, and in statu quo, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors the testator cannot wholly release it from liability for his debts; but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate, the fund out of which pecuniary legacies are in the ordinary course payable.

This reasoning does not apply to a gift in general terms of the whole personal estate to which a testator may be entitled at the time of his death (1 Roper Legacies 4th Ed. pp. 242, 243; *Fairer* v. *Park* (1); *Ouseley* v. *Anstruther* (2)). It is of course in the power of any testator, if he so pleases, to direct that his pecuniary

(1) 3 Ch. D. 312.

(2) 10 Beav. 453.

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legacies (and also his debts &c., if he sufficiently provides for their payment) shall be exclusively charged on his real estate, or on any particular property real or personal which he may think fit (*Lance* v. *Aglionby* (1); *Jones* v. *Bruce* (2)). But an intention to do so must be discoverable from the terms of his will. In the cases last cited such an intention was sufficiently clear without any aid from the presumption applicable to specific legacies as such.

It is true that in *Jones* v. *Bruce* (2) Sir Lancelot Shadwell said that the gift of the whole personal estate was as specific as if the testator "had enumerated every chattel, and then said, I give them to my wife." But that dictum was not necessary for the decision; nor can I reconcile it (if his honour really intended to say that this without more would have been enough to exonerate the personalty, in the absence of any other provision for the large pecuniary legacies there in question) with either principle or authority. If that gift had been to the wife for life, with remainder over, the personal estate must have been converted into money and invested, and she would not have been entitled to enjoy it in specie, under the doctrine of *Howe* v. *Lord Dartmouth* (3) and other cases of that class.

In the present will there is nothing from which an intention to exempt the general personal estate bequeathed to Mrs. Robertson from its ordinary burdens, or to give it the quality (in that respect) of a specific bequest, can be inferred, unless it be one or other, or the combination, of these two circumstances,—1st, that the "money and securities for money" of which the testator might die possessed, are excepted from the gift; and 2nd, that it is followed by another gift, of "all the rest residue and remainder" of the testator's estate "both real and personal" (to the persons who are appointed executors at the outset of the will), upon trust to pay thereout two legacies, and to dispose of the rest for charitable purposes.

The gift in question, to Mrs. Robertson, is preceded, first by a direction to the executors to pay all the testator's debts and funeral and testamentary expenses as soon as conveniently may

(1) 27 Beav. 65. (2) 11 Sim. 221, 228.
(3) 7 Ves. 137.

be after his death, and then by a great number of pecuniary legacies, amounting together to £48,600, of which £7500 are for charitable objects and £2000 for Mrs. Robertson herself. The testator has nowhere said that his funeral and testamentary expenses and debts, or his pecuniary legacies, are to be paid in any other way than that in which they would be payable according to the ordinary course of law. It is contended that this consequence results from the residuary form of the gift which follows, as compared with the gift to Mrs. Robertson, which is not in form residuary; "residue" being that which remains of the estate, after all necessary deductions, and after satisfying all prior gifts.

The Court of Appeal appears to have thought that the excepted personalty would be primarily liable to the funeral and testamentary expenses, debts, and pecuniary legacies; but they decided that there was no exemption from those charges of the personalty given to Mrs. Robertson. As to the real estate, nothing was determined. With this view I agree. I think that the exception of something specifically described, from a gift (otherwise general) of the personal estate, cannot make that gift more specific, in the proper sense of the term, than it would be if there were no such exception. It is indisputable that this testator intended his pecuniary legacies to be paid in full, free of legacy duty; and he expressly directed that such of them as were for charitable purposes should be paid exclusively "out of *such part of his personal estate* as might lawfully be appropriated to such purposes, *and preferably to any other payment thereout.*" These words, in their natural sense, extend to every part of his personal estate which might lawfully be so appropriated, whether included or not included in the gift to Mrs. Robertson; and give the charitable legacies, as against the whole pure personalty, a preference over every other payment, and, therefore, over any payment to Mrs. Robertson. This could not have been disputed, if the *whole* personal estate had been given to Mrs. Robertson. But the fact that "money" (which might and probably would, at the time of the testator's death, be quite insufficient), and "securities for money" (which might be mortgages, or other securities savouring of realty), are excepted, cannot reduce the

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right of the charitable legatees (in the event of Mrs. Robertson surviving the testator, as she did) to a charge upon such, if any, of those excepted things only as might consist of pure personalty. A gift which is subject to legacies, so far as relates to the charitable legatees, cannot, under the terms of this will, have a different character as to the other pecuniary legacies.

The order appealed from is, in my opinion, right, and I move your Lordships to dismiss this appeal, with costs.

LORD BLACKBURN :—

My Lords, at the close of the argument in this case I had not much doubt that the order appealed against was right, and that the appeal must be dismissed, but I was glad to have time to look at and consider the authorities cited, as the course of my practice as a barrister, and afterwards as a judge in a Court of Common Law, did not make me familiar with this branch of law, which was principally administered in the Courts of Equity.

A testator cannot deprive his creditors of their right to be paid their debts out of his assets, but, subject to their rights, he may dispose of the surplus as he pleases.

I do not complicate the question by saying anything as to real estate. I suppose the case of a man having personal property only, such as chattels real, ships, stocks, goods, and moneys. If he by his will leaves legacies, the executor who takes all the personal estate must first pay the debts and other charges on the testator's estate, and then, as far as he has assets, pay the legacies. If he has enough to do so in full no question arises. But, if either from the testator having over-estimated his pecuniary means, or having under-estimated his liabilities, there is not enough to pay the whole in full, all the legatees cannot be paid as much as the testator intended, and the question arises whether some of the legacies are to bear the loss before the others are abated at all, and then the others, if there is still a deficiency, are to be abated rateably. Sometimes a testator foresees this possibility of a deficiency and provides for it. This was done by a codicil in *Farmer* v. *Mills* (1); when a testator does so there can be no doubt about it, his expressed intention governs.

(1) 4 Russ. 86.

Sometimes after giving legacies to a large amount he leaves the residue to some one. It does not need authority to shew that in such a case the residuary legatee can take nothing until all the other legacies are paid in full, for till then there is no residue.

But in the absence of something to shew an intention on the part of the testator to the contrary, he must be taken to intend all his legacies to be paid in full; and, if that is impossible, all are to be reduced rateably, unless there is something to shew the intention of the testator that one or more of the legacies are to be paid in full, though the consequence may be that the others are to be the more reduced or perhaps not paid at all.

Let us suppose that a testator leaves his library, such as it should be at the time of his death, to A., £10,000 to B., and the residue of his personal estate to C., very probably believing, perhaps even indicating on the face of his will, that he thought his library would be worth £10,000 and the whole of his personal estate, including the library, worth £50,000; and owing either to miscalculation on his part, or to unforeseen disasters, his personal estate, including his library, turns out, after all debts and charges are paid, to be £19,000 only. No one can doubt that the testator, if alive, would remodel his will and give something to C., perhaps burthening the library with a payment to C., and reducing the legacy to B., so as to get the means of giving something to C. But he is dead and the Court cannot make a will for him. C., hard as it may seem, can get nothing under the bequest of the residue, for there is no residue; and it is settled by decisions, and, I think, if it was res integra, I should hold that, as the intention on the face of the will is that A. should have the library as a specific thing such as it should be at the testator's death, he must have it, whether it is of more or less value than the testator supposed, and that B. can only get the £9000.

It is, as I think, on this ground and on this principle that, where there is a deficiency, the first to suffer is the residuary legatee, then, if there still be a deficiency, the general legatees, and then the specific legatees.

I think that, in considering the case below, more has been said as to the definition of what is a specific bequest, as if it was a technical question, than was quite requisite for the decision of

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the case. I do not know, if it were necessary to give a definition of a specific legacy, that any would come nearer to my idea than what has just been said by the Lord Chancellor in this case, "something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate."

I do not however like to bind myself even to saying that this is a precise definition. I think the real question is what is the true construction of the will of this testator, by which, after giving large pecuniary legacies, some to charities and some to individuals, amongst whom is Mrs. Robertson herself of £2000, though I do not think that material, he proceeds thus:—[His Lordship read the extract from the will set out, ante p. 812].

I think this is really a bequest of all the residue of his estate to Mrs. Robertson and the two trustees, the trustees to take the real estate and the money and securities for money, and Mrs. Robertson all the rest of the personal estate, and that there is nothing on the face of the will to indicate any intention that either she or the trustees were to take that property in the state and condition in which it should be at his death.

It was argued that the testator probably was thinking of the furniture, farm, stock, and so forth, at Royden Lodge, which formed the bulk of his personal estate not consisting of money or securities for money, and that he really meant to give her those to be enjoyed in the same state and condition in which he left them. It is possible he did, but he has not said so in his will. He has, no doubt, left her those, and his wine in London, and also a steam launch and two boats, and a leasehold stable in London, which it is less probable that he meant to be enjoyed in the same state and condition in which he left them. But it all comes round to the same thing. The Court cannot make a will for the testator, it must construe the will he has made. And I think that the bequest of the residue of his effects which shall not consist of money or securities for money to Mrs. Robertson, and the residue of his personal estate to the two trustees, is one residuary bequest to two persons.

I have spoken as if there had been no real estate, though in fact there was a considerable real estate. I have done so, because the heir not being before the Court, it cannot now decide what portion of that real estate is available to pay the legacies, and ought to be so applied in relief of this residuary bequest.

It may possibly be that the solution of the questions between Mrs. Robertson and those entitled to the real estate, which are reserved by the order, will render the present decision of no practical consequence. It is possible that it will leave it of great consequence. All I now say is, that I think it is rightly decided by the order appealed against.

LORD FITZGERALD :—

My Lords, I concur in the judgment of the Lord Chancellor and adopt his reasons.

The gift is to be read as a bequest to the trustees of the money and securities for money of which the testator should die possessed, and of all the residue of his personal estate and effects to Mrs. Robertson for her own use and benefit absolutely. The gift is not specific within the definition so carefully expressed by the Lord Chancellor, and there is nothing in the will to indicate any intention of the testator to exempt the subject of that bequest from its ordinary liabilities. There is much in the will leading to a contrary conclusion and which the Lord Chancellor has already pointed out.

I think the order appealed from is correct.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals 23rd July 1883.

Solicitors for appellants: *Young, Jones, Roberts & Hale.*

Solicitors for Attorney-General: *Hare & Co.* for the *Solicitor to the Treasury.*

Solicitors for pecuniary legatees: *S. Copping.*

Solicitors for executors: *Lawford, Waterhouse & Waterford.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1882 Dec. 5.

JOHN ORR EWING & CO. . . . . APPELLANTS;

AND

JOHN ORR EWING . . . . . RESPONDENT.

Deed of Partnership, Construction of — Paying out Deceased Partner's Share — Interest thereon how paid.

A deed of partnership provided that in the event of the death of any of the partners, and in the event of the surviving partners electing to continue the business, the amount at the credit of the deceasing partner as at the last balance "shall be paid out to his representative by instalments of equal amount at six, twelve, &c., up to sixty months' date, "from the date of the surviving partners declaring their election," "with interest thereon from the date of the balance."

The chief partner, whose interest was about £394,340 in the concern, died. The surviving partners having elected to continue the business, sought to pay his representative by ten equal instalments, with interest on the amount of each instalment from substantially the date of the death to the date of payment. In a claim by the deceased partner's representative that interest should be added to each instalment on the balance of the capital sum remaining unpaid at the date of the payment of each such instalment; thus reaping an advantage of about £2365 from the earlier payment of the larger sums of interest:—

Held (Lord Watson dissenting), affirming the decision of the Court below, that the interest to be paid with each instalment was interest calculated upon the balance of the capital sum unpaid at that date, and not interest upon the amount of each instalment.

APPEAL from the Second Division of the Court of Session, Scotland.

The facts and material clauses of the deed of partnership are sufficiently set out in Lord Blackburn's opinion.

Dec. 1, 1882. On appeal, *Davey*, Q.C. (with him, *Webster*, Q.C.), was heard for the appellants, and *Sir F. Herschell, S.G.* and the *Solicitor General for Scotland* (*Asher*, Q.C.), were heard for the respondent.

Dec. 5. LORD BLACKBURN:—

The solution of the question in dispute between the parties in this appeal depends entirely on what is the true construction of a

few words, I might almost say of one word, in the 16th paragraph of the deed of partnership of the firm of John Orr Ewing & Co. dated the 15th and 16th of January, 1878. That partnership was to be for ten years from the 1st of January, 1878, but it was necessarily subject to be terminated sooner by the death or bankruptcy of any one of the partners; and it is thus provided by the 16th paragraph, of which I shall now read the material part:—

In the event of the death, bankruptcy, or declared insolvency of any of the partners during the subsistence of the copartnership, the surviving or solvent actual partners at the time shall be allowed the period of three months from the date of such death, bankruptcy, or insolvency to consider and determine whether they shall continue to carry on the business, and pay out the share and interest of such deceasing bankrupt or insolvent partner as the case may be, or whether the business shall be wound up, which option shall be declared at the end of the said period of three months, or sooner, if the surviving and solvent partners shall find it suitable to do so, and during the interval the business shall be continued by the surviving and solvent partners. In the event of the surviving and solvent partners electing to continue the business, the amount at the credit of the deceasing or insolvent partner as at the last balance of the company's books, taken as at the 31st of December preceding such death or insolvency, when the books were balanced or ought to have been balanced as hereinbefore provided, together with any sum subsequently paid to the firm by him, and in the case of the said John Christie, the balance of salary, if any, due to him, shall, under deduction of any sums withdrawn by such deceasing or insolvent partner, be paid out to his representatives (except the representatives of the said John Orr Ewing) or creditors, as the case may be, by instalments of equal amount, at six, twelve, eighteen, twenty-four, thirty, and thirty-six months' date, from the date of the surviving and solvent partners declaring their election, or at shorter periods if the solvent and remaining partners shall so determine, with interest thereon at the rate of five per cent. per annum from the date of the balance in the event of the death, but without interest in the event of insolvency or bankruptcy, and for these instalments bills with sufficient security shall be granted. But provided always, that in case of the death of the said John Orr Ewing, his interest in the company ascertained as aforesaid shall be paid out to his representatives by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months' date as aforesaid, with interest as aforesaid, and for these instalments bills of the company shall be granted, with the security of the works and lands in Dumbartonshire, being the property included in the company's books, under the names of "Field Account" and "Land Account," and also the property numbered 46 and 44, West George Street, Glasgow, and all other heritable property which may belong to the company. In the event of the death or bankruptcy of any of the partners before the 31st of December, 1878, being the date at which the first yearly balance is to be made, the amount appearing at the credit of such partner, with interest

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at five per cent. per annum from the date of such amount being placed to his credit, and with the addition, in the case of the said John Christie, of the balance of salary, if any, due to him, shall be paid out in manner before prescribed to his representatives or creditors, as the case may be, but under deduction always of such sums as he may have withdrawn from the concern.

Lord Blackburn.

The event that has happened is, that John Orr Ewing, the principal member of the firm, and who had the chief interest (about £394,340) in it, died on the 15th of April, 1878. The surviving partners on the 30th of June, 1878, declared their option to continue to carry on the business and pay out the share and interest of the deceasing partner. As the event happened before the 31st of December, 1878, the amount of the share and interest of the partner has to be ascertained in the manner provided for in the last words which I have read. And as it was John Orr Ewing who died, some further deductions have to be made, with which I need not trouble your Lordships. There is no dispute what is the principal sum which is to be paid out, nor that, as it was John Orr Ewing who died, that principal sum is to be paid in ten instalments in the same way in which the interest of any other partner deceasing or becoming insolvent was to be paid in six instalments. And the sole question raised is as to what is the true construction of the words "with interest *thereon* at the rate of five per cent. per annum from the date of the balance in the event of death, but without interest in the event of insolvency or bankruptcy." It is quite clear that in the event of insolvency, the instalments were to consist of a sixth part of the amount to be paid out by the firm, and for each of those a bill is to be given, making the amount payable at the respective dates. And it is equally clear that in the case of death the representatives of the deceasing partner are, in addition, to have interest on something. It does not appear to have occurred to the person preparing the deed that there could be any doubt as to how that interest was to be paid. It is a pity it did not occur to him that it might be a question whether it was to be included in the bills, or was to be paid separately. If it had so occurred to him, probably he would have used words to shew that it was to be included in the bills, which he has not done, and in so doing he could hardly have failed to make it clear on what that interest was to be paid and

so prevented the present difficulty. All parties have agreed that the bills should be drawn not only for the equal share of the principal sum, but also for the interest which would be payable at the date when the bills became due; and the only question raised is what that interest is to be calculated upon; or, in other words, what does the word "thereon," as used in this passage, refer to?

The Lord Ordinary (1) framed his interlocutor on the construction that the interest at the rate of 5 per cent. per annum was to be "on each instalment" from the date of the balance. The majority of the Second Division (dissenting Lord Craighill) (2), recalled that interlocutor and found that the interest was to be "on the balance of the said principal sum due or unpaid at the date when each such instalment became due;" and the question is which is right.

I cannot agree in what is said at the end of Lord Young's judgment (3), that the construction put upon the deed by the Lord Ordinary and Lord Craighill is either whimsical or unjust, or that the Court should favour a subtle and ingenious construction to avoid it. But I have come to the conclusion, on grounds substantially the same as are stated in the earlier part of his judgment, that the interlocutor appealed against is right. I think there can be no controversy that in construing a deed the Court are to look at the whole instrument and say what is the intention evidenced by the words used in such an instrument and with reference to such a subject matter, and that the Court is to take the words in their ordinary grammatical meaning. And I agree with the Lord Ordinary and Lord Craighill that it is a rule, not I think of law, but of the grammatical construction of the English language, that words of relation refer to the last antecedent. But I do not agree with them in thinking that what comes nearest to the words of relation is necessarily to be taken as the last antecedent. On the contrary, I think that the

(1) Lord Lee.
(2) 7th Feb. 1882.
(3) 10 Court Sess. Cas. 4th Series (H. L.) 1; Lord Young and Lord Rutherfurd Clark disagreed with the Lord Ordinary; Lord Craighill agreed with him. The Lord Justice Clerk was absent; therefore the judges in the Court below were equally divided.

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context and the subject-matter may shew that something more remote in the collocation of words really is the antecedent. I think that as soon as the option was exercised, that sum which stood in the books as the interest of the deceasing partner was changed from being the interest which that partner had in the assets of the firm and became the price to be paid by the continuing firm for his interest. And I think that so long as any part of that price remained unpaid, the natural thing, and what we should primâ facie expect, is that the interest which was to be paid was to be on that portion of the price of which the continuing partners had the use, and of the use of which the representatives of the deceased were deprived. It seems to me that this is enough to justify the Court in saying that "thereon" does not relate to "instalment," though that is the word which in the collocation of words is the nearest, but to the amount which was to be paid out, though further off in the collocation of words. Some reference was made, both in the judgments below and in the argument at your Lordships' bar, to other clauses in the deed; but I do not think any of them throw light on this. I do not think the point is capable of being elucidated by argument: the principle is I think what I have stated. On its application one mind will come to one conclusion, and another to a different one. In fact we know that of the four judges below, two came to one conclusion, and two to the other. And I am afraid that in this House your Lordships also differ. I need hardly say that I think it by no means an easy question. But for the reasons here given I think that the interlocutor appealed against is right. I therefore move that it be affirmed and the appeal dismissed with costs.

LORD WATSON:—

I concur with the legal principles which have just been laid down by the noble and learned Lord. I think it necessary that I should explain very briefly the reasons which induce me, notwithstanding, to differ from the conclusion at which he has arrived. This is not a case in which words having a plain and obvious primary meaning must be read according to a secondary and more forced construction because the adoption of

the primary meaning would lead to results in themselves harsh and inequitable or contrary to the main purpose of the parties, as appearing from the terms of the deed in which the words occur. It appears to me to be a case where the words in dispute are fairly capable of receiving two different constructions; and in endeavouring to arrive at the just construction in such a case, I think it is always right to inquire, in the first place, which of the two constructions submitted by the parties respectively is the more natural one; and in the second place to consider whether that meaning is to be ousted because of some probability to the contrary arising either from the terms of the deed itself or otherwise. Now, in dealing with the clause which is before the House, I entirely assent to the view taken by my noble and learned friend that very little, indeed no assistance is to be derived in construing it from expressions occurring in other parts of the deed with regard to the payment out of partners, in certain other events, by instalment bills. That is a circumstance which gives rise to two counter arguments, in my opinion, of nearly equal plausibility, and therefore neither party can derive much aid from their use. But in the present case, taking the words as they stand, I prefer the construction submitted on the part of the appellants to that submitted on the part of the respondent, for this reason:—Assuming that the parties meant, as the appellants contend, to stipulate that Mr. Orr Ewing's executors should receive payment of his interest in the concern by ten instalment bills, each for a proportion of the principal sum with interest upon the amount of that instalment to be included in each bill, then the parties in order to give effect to that stipulation have framed a consecutive unbroken sentence, which expresses with perfect fullness and precision all that they meant to bargain for; every provision requisite is expressed—nothing whatever is left to implication. But on the other hand, if you adopt the construction submitted by the respondent, it is necessary to introduce into that sentence a very long parenthesis, and it is necessary to supply by inference a great deal that is required in order to bring out the full meaning of the parties. Now, as between two such constructions, and irrespective of any considerations which may point to the one or the other of them arising from the probabilities of the case, I do not

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hesitate to adopt the former, that which fully expresses the mind of the parties without break, with connection, and without leaving anything to inference. That leads me to consider whether there are such probabilities existing in this case as ought to make me prefer the respondent's construction. If such a probability did exist according to my apprehension, I should not be disposed to insist upon a very imperious probability; because it appears to me that any reasonable probability, although not in degree very strong, would be sufficient, in the circumstances of the present case, to turn the scale in favour of the respondent.

I find that Lord Young in delivering his opinion as one of the majority of the Second Division, puts the matter thus:—"I do not say that the clause is incapable of the construction contended for by the defenders; but thinking it also capable of that maintained by the pursuer, which is certainly, in my opinion, more just and equitable, I prefer the latter as more probably according to the meaning and intention of the parties." I do not think that justice or equity enter into this matter. I do not think that there would be any injustice or inequity in giving effect to the appellants' contention; and I take it that probably these words of Lord Young were meant to express no more than this,—that it would not be just or equitable to refuse effect to the probabilities of the case which appeared to his Lordship to favour the respondent. I am not going to canvass those probabilities in detail, but will only say that, looking to the deed itself, which in my opinion is the legitimate source to which to look for the existence of such probability, I cannot discover anything decisive one way or the other. No doubt many considerations may be suggested to shew that Mr. John Orr Ewing's executors should have full interest upon his share; but as against these I put the very natural consideration, why, in a deed like this, which stipulates that interest shall be paid in other cases by instalments, according to the contention of the appellants, should harsher terms be imposed upon the firm in the paying out the largest partner, so as to involve a very heavy strain upon the resources of the firm? It is not a question whether Mr. Orr Ewing, if the option had been given him, would have probably preferred taking the larger sum. That does not appear to my mind to be the

proper test of probability here. The question is, what would the parties probably have done in contracting with each other as fair and reasonable men? I can only say that I am not satisfied that it would have been either unjust or unreasonable for them in settling these matters together beforehand, to adopt either the one or the other of the constructions which have been submitted to the House. I do not think that the one can be said to have been, at the time when this contract was framed, more or less reasonable than the other; and consequently I do not think that it can be predicated that the one is more or less probable than the other; and it is, my Lords, because of my inability to arrive at the conviction that any such antecedent or à priori probability does exist in this case that I am unable to concur in the judgment just proposed.

LORD BRAMWELL:—

This is a remarkable case. There is no provision in the agreement that the interest shall be a part of the bills; and yet the parties seem to have considered that it was intended that it should be so, and doubtless it was. There is also no direct provision that any interest shall be payable until the payment of the last instalment. The words are that the instalments are to be paid "with interest thereon;" the question is whether that means on the principal or on the instalments. It is equally left unprovided in terms whether that interest shall be paid from time to time, or whether it shall be payable at the last payment of the principal. But I think that it would be right to construe this stipulation as the parties have construed it, namely, that interest is not postponed until the last payment, but is payable from time to time as payments are made on account of the principal.

That being so, and assuming that interest is to be paid from time to time as the instalments are paid, is the interest to be calculated on the instalments and paid on the amount of the instalments, or upon the sum which is due at the time when the payment is made, or due up to that time? Now I cannot help thinking, for my own part, that it is not a matter of justice or injustice; because the parties might make any agreement they thought fit. If we could suppose that in negotiating, one

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party had stood out for the one mode of payment and the other had stood out for the other, and at last one of them had yielded, there would have been no injustice in making such a stipulation either one way or the other. But what does seem to me a reasonable way of looking at this thing, and a way in which we have a right to look at it, is this; inasmuch as the words are admittedly ambiguous, we must look at what is the reasonable and probable thing. Now the reasonable and probable thing, to my mind, is that if you are to assume interest to be payable from time to time, it ought to be payable not upon the amount of principal paid from time to time, but upon the amount due from time to time, that is to say, if any one were to come to me to prepare a deed by which £3000 was to be lent, payable in three years, and the instructions merely said that it was to be payable in three years by three equal instalments, at the end of the first, second, and third years, with interest at five per cent. payable from time to time, intending to follow my instructions I should prepare a deed, undoubtedly, which would make the interest payable at first on £3000; when the second instalment was paid, on £2000; when the third instalment was paid, on £1000. That seems to me to be the reasonable view and that which one would understand from general instructions such as I have endeavoured to describe.

But the case may be put also thus—supposing that nothing had been said about instalments, and that the sum payable was not payable until the end of the three years, or, as in the case of Mr. Ewing, until the end of the five years, but that a provision had been made that from time to time half-yearly payments of interest should be made, no doubt in that case it must be payable upon the entire principal. Why, then, because a provision is made that the principal shall be paid off from time to time, should the interest be supposed to be payable upon more favourable terms to the debtor than if there had been no such provision? Of course I must not be supposed to be treating the views of those who differ from me as unreasonable; but what seems to me to be the more reasonable thing is, that the sum due should be paid with interest, and that the interest payable should be calculated upon the sum due. And I am particularly corroborated, as it seems to me, in that idea by the fact

that interest on this money was allowable (when I use the expression "allowable," I mean was payable) by the firm to Mr. Ewing from time to time upon the principal money while he was alive; and why when he died and the money became a debt from the remaining partners of the firm to his representatives the interest payable upon it should be of a less favourable character to his representatives than it was to him when he was alive, I am at a loss to see. It seems to me, therefore, that what I cannot help calling, with great respect to those who differ from me, the reasonable agreement for these parties to make was that which the respondent contends was made here.

But a difficulty is raised upon the grammatical rule that the word "thereon" must be taken to refer to the last antecedent. Now that rule cannot be applied here, because the very last antecedent is "partners." Nobody can suppose that interest is payable upon the partners, of course. The next antecedent before that is "periods." It is just possible, I suppose, that interest might be payable upon a period. Then there is another antecedent before that, namely, "election," and there is another antecedent before that, which is "partners," so that you do not come to the antecedent which the appellants are so anxious to rely upon, that is to say, "instalments," until you have passed over four other antecedents. That being the case, if you may pass over four antecedents on account of the good sense of the thing, I cannot see why you may not pass over a fifth. I confess that I feel no difficulty upon that score. Further, if I had had to prepare the deed, in speaking of the instalments, if I had meant that interest should be paid upon the sums paid by instalments, I should not have said that interest should be payable on the instalments but on the amount so payable by each instalment. That would appear to me to be the more natural expression to use. I think that that is all that one need say upon the construction of the clause itself. I cannot quite agree with what has been said by my noble and learned friend opposite (Lord Watson) that you can get no assistance from the other clauses. I think that you can get a little, because it seems to me that in the other clauses where provision is made for the payment of money by instalments it is expressly said that the

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amount of the instalment shall be that upon which the interest shall be paid from time to time. I think I may say that in every case it is so. It may be said, Well then why did the draftsman make a difference between this case and the others? In the first place, I think it is very likely that he did not think anything at all about it one way or the other, and we are speculating upon what was the meaning of the parties when the fact is that the subject was not present to their minds. But if one is to act upon the general rule, and attribute a meaning to them in the words which they have used, I think it is perfectly possible that the draftsman may have said: In this particular case of a deceasing partner his capital is bearing interest from time to time while he continues a partner, and therefore when he ceases to be a partner it ought to do the same. It is not so with the others. It seems to me that the judgment appealed from is right. It does not seem to me to be a case for a confident opinion. I should not set much value upon any confident opinion expressed by anybody whatever in this case. It is too obvious that intelligent people may take different views of the matter. I should like to say that although I have not referred particularly to the judgments given in the Scotch Courts, I think it will be seen that I have derived the arguments which I have used from those judgments. In my opinion this appeal ought to be dismissed.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Agents for appellants: *Martin & Leslie.*
Agents for respondent: *Grahames & Currey.*

[HOUSE OF LORDS.]

DIXON (LIMITED) AND OTHERS . . . APPELLANTS;
AND
WHITE AND OTHERS . . . . . RESPONDENTS.

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1883
March 19.

Mines and Minerals—Inherent Right of the Surface Owner to necessary Support—Express Obligation to pay Compensation for Damage done by "the foresaid Operations:" Meaning of—Construction of Titles.

If the owner of a piece of land sells the surface and reserves the minerals below it, with power to get them, he must, if he intends to have the power of destroying or letting down the surface by subsidence in getting them, frame his power in such language that the Court may be able to say from the titles that such was clearly the intention of the parties.

A. was the owner of 500 acres of land. He, in 1800, feued the whole coal, &c., therein to B. with full power to work and win the same, and for that purpose to set down pits, &c., but expressly providing that B. should not be at liberty to sink pits, or break the surface of the land lying on the north of a certain line: with full power, however, to work the coal there, provided it was done from pits situate on the south of the line, without breaking the surface of the land on the north; but for the "whole damage and injury occasioned by the foresaid operations," A. and his successors "shall be completely paid and indemnified by" B. In 1801 A., by disposition and sale, conveyed to C.'s predecessor all his right and title in a parcel of land situate on the north of the line, reserving to himself and his feuars the liberty to take the coal, substantially in the terms given above, and providing that the persons carrying on these operations were to be liable to C.'s predecessor "for the whole damage thereby occasioned:" declaring that the rules contained in the above feu right should be the rule of settlement between C.'s predecessor and B. In 1799 A. had feued to another predecessor of C. a parcel of land contiguous to the above and also to the north of the line, under reservation of the minerals, and with liberty to work the same "so as not to break the surface of the said lands or injure the springs therein upon payment to" C.'s predecessors "any damage that may be occasioned to the said lands by the working of the minerals." B. claimed an absolute right to work out the whole of the coal, under the obligation to pay C. a money compensation for any damage done to the surface:—

Held, affirming the decision of the Court below, that there was nothing in the titles of the parties which had the effect of taking away or derogating from the common law right of the owner of the surface to insist that the owner of the minerals shall leave sufficient supports to sustain the surface uninjured; and that the provision as to payment of compensation

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clearly meant payment of compensation for damage done by accident or negligence.

The rule established in *Rowbotham* v. *Wilson* (8 H. L. 348) and *Andrew* v. *Buchanan* (Law Rep. 2 H. L., Sc. 286) cited. *Aspden* v. *Seddon* (Law Rep. 10 Ch. App. 394) approved but distinguished.

APPEAL from the First Division of the Court of Session, Scotland. The respondents, White and others, are proprietors of certain contiguous subjects, in all thirty-six acres, upon the banks of the Clyde, namely, Shawfield Brae, Clydebank, Southcroft, and Hayfield, upon fifteen acres of which they have erected large chemical works at great expense. The appellants, the trustees of the late William Smith Dixon, and William Dixon, Limited, are the owners and lessees respectively of the minerals under lands of great extent, adjacent to the respondents' property, as well as of the minerals under a large portion of the respondents' lands. The only question in this appeal is whether the appellants had under the titles of the parties an absolute right to work out the *whole* minerals of which they were the proprietors, under the respondents' lands, subject to payment of compensation for damage to the surface; or were they bound to leave sufficient subjacent and adjacent support to sustain the surface. Both parties derive their title from a common author, namely, Robert Houston Rae, who shortly before 1800 was proprietor of a very large estate known as the Little Govan coalfield, which includes the lands and minerals in question. The appellants' title is a feu disposition, dated the 26th and 28th of July, 1800. By this deed, Robert Houston Rae, after a narrative—for which see Lord Blackburn's opinion, p. 843—(with consent of Archibald Grahame his trustee) disponed to and in favour of himself and Andrew Houston, his brother, as partners of the Govan and Polmadie Coal Company,

All and whole the whole coal and ironstone in the whole lands of Little Govan and in the lands of Polmadie, Shawfield, Rutherglenmuir, Bencathhill, and Blackfaulds, being the whole coal and ironstone which belongs to me, the said Robert Houston Rae, and which lands are delineated on the plan after mentioned, signed as relative hereto, and which lands lie in the following parishes and shires (here follow the names of the parishes and shires), with full power and liberty to the said Andrew Houston and Robert Houston Rae, as partners foresaid, and their foresaids, to work and win the foresaid coal and ironstone for their own benefit and advantage; and, for that purpose, with full power and liberty to them to set down coal-pits, make coal-hills and mouths,

drive levels, drains, erect dwelling-houses, engines, and all machinery necessary for the purpose of working or drawing the foresaid coal and ironstone. But it is hereby expressly declared that they shall not have liberty to set down any coal-pits, make any coal-hills, or mouths, or erect any machinery, make any drains, levels, or break the surface of the land belonging to the said Robert Houston Rae, lying on the north side of a line delineated on a plan of the lands of Little Govan signed as relative hereto (here follows a minute description of the line), with full power and liberty, however, to my said disponees to work and win the coal and ironstone of the said lands lying to the north of the said line, provided the same be done from pits on the south side of the line, without breaking the surface of the land lying on the north side of the said line. . . . . But for the whole damage and injury occasioned by the foresaid operations and roads and quarries to the foresaid lands, the said Robert Houston Rae, and his heirs and successors, shall be completely paid and indemnified by his said disponees, who, by acceptation hereof, bind and oblige themselves to pay the damage occasioned by the said operations to the said Robert Houston Rae and his foresaids, as the same shall be ascertained by two neutral persons to be mutually chosen by the parties interested.

There is no dispute that the respondents' lands in question lie north of the line mentioned in this deed. They are held under two different titles. By feu contract, dated 1799, Mr. Rae—at that time proprietor of both the lands and minerals—feued to John Goudie, the respondents' predecessor in title, the lands of Shawfield Brae and Clydebank, containing six and a half acres, but under reservation of the minerals in these terms:—

As also reserving to him (Robert Houston Rae) and his foresaids the whole coal and other metal and minerals in the said lands, with full power and liberty to him and them by themselves, their tacksmen or servants, to work and win the said coal, metals, and minerals, so as not to break the surface of the said lands, or injure the springs therein, upon paying to the said John Goudie and his foresaids (his heirs and assignees) any damage that may be occasioned to the said lands by the working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen by the parties.

The respondents' land of Southcroft and Hayfield is part of a parcel of land consisting of twenty-five acres, originally acquired from Mr. Rae and his trustee Archibald Grahame by disposition dated January, 1801, in implement of a contract of sale under articles of roup, by James Hill, Prof. Young, and Robert Grahame, the predecessors in title of the respondents. The reservation of the minerals was in these terms:—

Reserving also to us and our successors, tacksmen, or feuars, the whole coal and ironstone in the foresaid lands and estate, and power and liberty to us and our successors, feuars, or tacksmen, or others deriving right from us, to work

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and take away the same, and to drive levels and drains, and do all other things necessary for the purpose of working and draining the said coal and ironstone, the persons carrying on these operations being also liable to the said James Hill, Mr. John Young, and Robert Grahame, or their foresaids, for the whole damages thereby occasioned, as the same shall be ascertained by two neutral men mutually chosen: Declaring always that the said James Hill, Mr. John Young, and Robert Grahame, or their foresaids, shall have no claim against me, the said Archibald Grahame, or my successors in office, or my heirs and successors, for the damages occasioned by working the said coal and ironstone, or making the said pits, hills, and roads, or any other operations whatever: And further, we and our foresaids, or our tacksmen and feuars, or others deriving right from us, shall have no right to break or enter upon the surface, or to erect any houses, or make pits or hills, or to make any other roads than that before reserved in the lands hereby disponed, all as particularly mentioned in a disposition of the said coal and ironstone granted by in favour of Andrew Houston of Jordanhill and me the said Robert Houston Rae, bearing date the , which was laid on the table at the foresaid roup, and was referred to in the said articles of roup, and which is hereby referred to and held as here repeated: Declaring that the rules and regulations and provisions contained in the said feu right shall be the rule of proceeding and settlement between the said James Hill, Mr. John Young, and Robert Grahame, and their foresaids, and the feuars of the said coal and ironstone, anything to the contrary above written notwithstanding.

The respondents raised this action for declarator that the appellants were "not entitled to work the coal and other metals and minerals adjacent to and under the pursuers' (respondents') lands, in such manner as to break the surface of or injure the springs in the said lands, or cause disturbance or subsidence of the surface of any part of the pursuers' several lands foresaid, or bring down or injure the buildings and machinery and erections upon any part of the said lands."

There was also a conclusion for interdict, but no decision has as yet been pronounced on that conclusion.

The appellants averred (cond. 3) the works originally placed on Shawfield Brae were acquired by the late Dr. White (the grandfather of Messrs. John White and James White) in 1807, and the adjoining properties, known as Clydebank, Southcroft, and Hayfield, have been subsequently purchased for the extension of the business. Prior to 1807 buildings were erected on Shawfield Brae, which were used as a bleach-work. Since that date the chemical works have been in operation, and have been enlarged from time to time as the necessities of the trade required. The

present firm have been in occupation of the works since about the year 1820, and they employ on an average between 500 and 600 workmen. The character of the works and the manufactures carried on therein is such that any subsidence or disturbance of the surface would be not only destructive of the buildings, flues, stalks, and fixed machinery, but would place the lives of those engaged in the works in the most serious danger. (Cond. 7) That the appellants had lately threatened to carry forward their workings up to as well as under the pursuers' property and works to an extent and in a manner which will deprive the pursuers' lands and works of the adjacent and subjacent support necessary for their stability, and will also destroy the springs of the said lands, and cause the surface to break or subside. The appellants' answer to this amounted to an admission. The respondents further averred (cond. 9) at the date of the titles of the lands holden by the pursuers the mode of working was universally by "stoop and room," with a view to supporting the surface of the lands; and for this purpose a quantity of mineral was unavoidably left undisturbed in stoops or blocks of sufficient strength and frequency to afford absolute support to the surface; but that about 1830, Mr. William Dixon, of Govan, introduced a practice of working out the minerals without leaving stoops, by the "long wall" system, which has been extensively adopted since, and the effect of which is to bring down the surfaces entirely. The appellants, again in answer, do not deny that they consider themselves entitled to take out the minerals under the respondents' lands in that way.

The respondents relied on their common law right to adjacent and subjacent support; and the restrictions in the titles restricting the appellants from working the minerals in the lands so as to break the surface or injure the springs.

The appellants' contention was (1) that the rights of the parties were not left to be regulated by the common law; (2), the titles did not restrict them from working their minerals of course by pits on the south side of the line, and on paying compensation for any injury to the respondents' property if the consequence of such working is to cause disturbance or subsidence of the surface; and (3), the words "so as not to break the surface," in the titles,

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did not refer to underground working but to standing or sinking pits or other surface operations on the respondents' lands.

On the 22nd of December, 1881, the Lords of the First Division, recalling the interlocutor of the Lord Ordinary (1), pronounced this judgment (2):—

Find that nothing contained in the titles of the parties, pursuers and defenders, has the effect in law of taking away or derogating from the right of the

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(1) Lord Rutherfurd Clark.

(2) 9 Court Sess. Cas. 4th Series, p. 375. The Lord President (Inglis) said, inter alia: Now, it must be observed in the outset that this is not a case where the owner of both surface and minerals grants a feu of the surface, reserving the minerals to himself. In such a case everything depends upon the terms of the title of the feuar or purchaser of the surface, because it is in that title that the reserved right of the original owner of both surface and mineral is to be found. But we have not a case of that kind to deal with here. The owner of the surface and the owner of the minerals derived their right from a common author, and it is just as necessary to see what rights have been given to the owner of the mineral by that common author as to see what is the right that he has given to the present owner of the surface. Indeed, when it is admitted by the mineral owner that he is about to work out the minerals under the property of another person, without any regard to his right, or the stability of the buildings which he has erected upon his ground, it appears to me that the first inquiry is, whether the mineral owner has got such a right in his own title; because, if he has not, then he is not entitled so to injure the property of his neighbour. No doubt it is also very important to inquire how far the owner of the surface has, by the terms of his title, submitted to the surrender of the common-law right, which, but for some qualification of that kind, would undoubtedly belong to him. But the primary question I think is, Whether the mineral owner is entitled to do that which he admits he has threatened to do? I begin, therefore, with the title of the defender (reads) . . . Now, the natural construction, I think, of the deed implies, that when in the damage clause there is a provision for paying damage "occasioned by the foresaid operations," the meaning is "occasioned by the operations which are expressly set out immediately after the dispositive clause —the manner in which the power of working is to be exercised." And this becomes more clear, I think, when you see that the "foresaid operations" are coupled with the other words "roads and quarries." These are precisely *ejusdem generis*. They are operations upon the surface, and operations therefore which will fall naturally under the operation of a damage clause. I cannot, therefore, read "foresaid operations" as meaning this, that whatever damage may be done in the exercise of the power of working or winning by what would be at common law illegal operations are to be compensated by money payments, and not to be unlawful. I think that, in order to take away the common law right of the owner of the surface to subjacent support, it is necessary that the intention to deprive him of that common law right must be

pursuers to insist that the defenders, in working out the minerals under the pursuers' lands, shall leave sufficient supports to sustain the surface uninjured: Remit to the Lord Ordinary to proceed further in the cause as shall be just and consistent with the above finding.

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either expressed or clearly implied; and it appears to me that the words here used, while they certainly do not express anything of the kind, do not, according to any fair construction, imply it either. I think, all the words which are used here are perfectly consistent with the retention by the owner of the surface of his common law right of support. It seems to be assumed always, that if there is a provision that whatever damage is done by the owner of the minerals is to be compensated by a money payment that gives him a kind of authority or power to do any amount of damage of any kind. Now, I am not aware of any authority for such a proposition as that. I do not know any case in which the mere provision of damage in case a thing be done has by itself and without any other aid from other portions of a deed, or from the circumstances, been held to infer a right to do the damage. There have been a great many cases cited to us, but I can find none in which a mere provision of damage without anything else has been held to infer such a right. And, therefore, so far as the title of the mineral owner is concerned, I come to the conclusion, without much difficulty, that he was not entitled to injure the surface by his works in such a way as to deprive the surface of the subjacent support to which at common law the surface owner is entitled. If, therefore, this question arose between the disponer of the minerals and his disponee, I should hold that the case was perfectly clear, and that the disponer, notwithstanding his giving out the mineral estate by this conveyance, had a right to have the surface supported, and most clearly supported as regards that portion of it which lay to the north of the line of the plan referred to, because it is perfectly plain that his great object in drawing that line upon the plan, and protecting the ground that lay to the north of the plan, was to prevent any operations whatever producing any injurious effect upon that portion of the surface which he expected to sell off for building ground. It would be a very strange result of this title, if, having protected the surface to the north of that line for the purpose of setting it off for building purposes, and preventing any of the ordinary surface operations being made upon that ground in the way of sinking pits or making hills, and so forth, or erecting machinery for the purpose of working the coal, he should have left it, nevertheless, so unprotected that, by underground operations, the whole surface might be brought down with the houses erected upon it. That would be a strange and anomalous result of such a title.

So stands the case as between the disponer and the disponee under that deed. Now, how does the matter stand as regards the pursuers, who have acquired from the grantor of that conveyance of the minerals?... I begin with the conveyance of the surface which is granted the year after this conveyance of minerals. [His Lordship reads the clause dealing with the minerals.]

Now, that is a very strange clause certainly to find in this disposition, looking to the fact that this is a part of the land which the owner of the estate had designed to protect absolutely against any operations upon the

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On appeal,

Dec. 8, 11, 1882. *Sir F. Herschell, S.G.*, and the *Solicitor-General for Scotland* (*Asher, Q.C.*), (with them *Mackay*), were heard for the appellants.

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surface; for under their clause, as I read it, the mineral owners would have been entitled to sink coal pits in that very land from which they were absolutely excluded by the operation of their own title. It is therefore perfectly obvious, especially from what follows, that the insertion of this clause in this disposition was a mere mistake; and, accordingly, we find that there is superadded to it—and I cannot help conjecturing that it would be found upon the margin of the draft of the disposition, if it could be recovered—this clause:—[Reads the clause as to the disponer having no right to break the surface.]

Now, the result of all this plainly comes to be, that the questions between the owners of the surface conveyed by this disposition, and the owners of the minerals conveyed by the disposition of the year before, are to be regulated entirely by the clauses contained in the disposition of the minerals. It is impossible to resist that conclusion; and, therefore, we are just thrown back, in so far as this conveyance is concerned, to the clauses which I have already been speaking of, and which appear to me not to favour the case of the defenders at all, but, on the contrary, to shew distinctly that the great object of the owner of the undivided estate was to keep the ground which now belongs to the pursuers entirely intact, in so far as the surface was concerned, and that no operations were to be permitted which could in any way interfere with his prospects of converting that into building ground.

There only remains for consideration the title which the pursuers have to the six and a half acres, which disposition was granted the year before the disposition of the minerals. Now, undoubtedly, there is a clause there which is much more difficult to construe than any of those I have hitherto dealt with. . . . . The words which cause the difficulty of construction are these—"Upon paying any damage that may be occasioned to the said lands by working of the said metals and minerals." This may mean any damage that may be occasioned to the surface of the lands by any operations which may be performed by the mineral owner, without inquiring or specifying what these operations may be; or it may mean, as contended for by the defenders, that it contemplates the bringing down of the surface upon condition only of paying damage. Now, keeping in view that long-wall working was a thing then entirely unknown, that the bringing down of the surface in that way was therefore a thing entirely unknown, and that the surface never was injured or brought down at all except by unskilful or negligent working in the ordinary mode by stoop and room, I think it would be very difficult indeed to give that meaning to the words. But I can quite understand that the parties may have had to do what was perfectly known to all the world—that persons working minerals after the then known fashion of stoop-and-room did occasionally, by accident or negligence, do injury to the surface; and if that was done, it was most reasonable to stipulate that damage should be paid for it.

Their argument sufficiently appears from the Law Peers' opinions. They cited *Aspden* v. *Seddon* (1); *Andrew* v. *Buchanan* (2); *Davis* v. *Treharne* (3).

The Lord Advocate (*Balfour, Q.C.*), and *Benjamin, Q.C.* (*Davey, Q.C.*, and *W. H. Bolton*, with them), were heard for the respondents. They relied on the case of *Davis*, Lord Watson's opinion (4); quoting with approval, Mellish, L.J., in *Hext* v. *Gill* (5); *Harris* v. *Ryding* (6); *Smart* v. *Morton* (7); Wood, V.C., in *Williams* v. *Bagnall* (8).

But the providing that damage should be paid for such an injury as that is certainly not equivalent to a power to inflict the injury upon paying damage. It is, on the contrary, a provision for the paying of damage for a wrong done, and not of paying compensation for a lawful power exercised. Lawful power to bring down the surface is very difficult to understand in the face of the words that the parties are not to break the surface or injure the springs therein. It seems to me, therefore, that whatever may be said of this clause otherwise, we have certainly not here either any express words, or anything like a clear implication that the owner of the surface conveyed by this disposition had surrendered or agreed to give up his common law right of support. Nothing but a clear implication or express words can, I think, take away such a right, and I am quite unable to find anything of the kind within the clause to which I now refer. I am, therefore, of opinion that the owner of this land, both the six and a half acres and the twenty-five acres—is entitled to his common law right of support, and that nothing contained in any of the titles interferes with that right.

Although the Lord Ordinary has been asked only to consider this question with which I have now dealt—there may be a case beyond that, of which I desire to say nothing in the meantime. The owner of the surface may so load the surface with superincumbent weight of buildings or other things as to render it impossible for the mineral owner to exercise his rights of working and winning in a fair way, without bringing down the surface or injuring it, and a question would in that case arise, whether the common law right of the owner of the surface can be pushed so far as to say, you shall not only not work minerals in such a way as to take away the natural support of the surface, but you shall not work them in such a way as to take away the support necessary for the great superincumbent weight which I have placed on the surface, far beyond what could have been contemplated by any of the parties to these deeds. That is fairly raised upon this record, and may form the subject of discussion hereafter.

(1) Law Rep. 10 Ch. 394.
(2) Law Rep. 2 H. L., Sc. 286.
(3) 6 App. Cas. 460.
(4) 6 App. Cas. at p. 469.
(5) Law Rep. 7 Ch. App. 699.
(6) 5 M. & W. 60, at pp. 70, 71.
(7) 5 E. & B. 30, at p. 47.
(8) Jan. 19, 1867, 15 W. R. 272, at p. 274. [See also *Dunlop* v. *Corbet*

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The House took time for consideration.

March 19. LORD BLACKBURN [having quoted the interlocutor of the Court below, continued :—]

There is no controversy now as to what is the law, both of England and of Scotland, as to the ordinary rights of the owners of the upper strata and of the subjacent minerals when those have come into different ownerships. The owner of the upper strata has a right of support from the subjacent strata. The owner of the minerals has a right to work out mineral in such a way as to make the greatest profit to himself, so long as he respects that right of support. But he has not a right to work out his minerals in such a way as to deprive the owner of the upper strata of that support to which he is entitled.

Those rights are given (to use a phrase familiar to pleaders of the old school in England, but not to Scotch lawyers) "of common right," that is, when it is established that the upper and lower strata are in different hands, it is not necessary either in pleading to allege, or in evidence to prove, any special origin for those rights, the burden both in pleading and in proof is on those who assert that the rights are different from those existing as of common right. But it may be shewn that these rights are varied. It never could have been doubtful that the owner of the whole undivided soil, who had power to let down the surface as he pleased, might grant the minerals to another with unrestricted liberty to remove them without any regard to the effect on the surface retained by himself, either stipulating for compensation to himself and his successors in title or not, as seemed to him most desirable; but it was thought by some that it was different

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(20th June, 1809; 15 F. C. 333); *Bald's Trustees* v. *Alloa Colliery Company* (16 Court Sess. Cas. 2nd Series, 870); *Humphries* v. *Brogden* (12 Q. B. 739); *Roberts* v. *Haines* (6 E. & B. 643); *Eadon* v. *Jeffcock* (Law Rep. 7 Ex. 379); *Caledonian Railway* v. *Sprot* (2 Macq. 449); *Hamilton* v. *Turner* (5 Court Sess. Cas. 3rd Series, 1086); *Duke of Buccleugh* v. *Wakefield* (Law Rep. 4 H. L. 377); *Smith* v. *Darby* (Law Rep. 7 Q. B. 716); *Dunbar's Trustees* v. *British Fisheries Society* (5 Court Sess. Cas. 4th Series, 350; affirmed 3 App. Cas. 1298); *Dalrymple* v. *Herdman* (5 Court Sess. Cas. 4th Series, 847); *Neill's Trustees* v. *Dixon* (7 Court Sess. Cas. 4th Series, 741); *Taylor* v. *Shafto* (8 B. & S. 228); and *Shafto* v. *Johnson* (8 B. & S. 252).]

where the owner of the land granted the surface, reserving the minerals, as they thought that a reserved power to take the minerals so as to destroy the surface by taking away all support for it was void, as being repugnant to and derogatory from the grant. The contrary has now been established, though not in England finally, till *Rowbotham* v. *Wilson* (1), in 1860, and not perhaps in Scotland till *Buchanan* v. *Andrew* (2), in 1874. But now, in both countries, it is established that the titles may shew that the surface is held on the terms that the owner of the minerals is at liberty to remove the whole of them without leaving any support to the surface, either, according as may be stipulated, without making any compensation for the damage thus occasioned, or having the right to remove the support, but being bound to make compensation for the damage done by exercising that right. It is, in every case, a question of construction of the deeds, to ascertain whether the intention so to contract appears on the titles. Lord Mure is reported as saying in this case, "that nothing but the most express terms," would entitle the Court to hold that the proprietors of the surface have accepted them under a contract to give up the right of support. I think that is going further than I should like to follow. But I think that the burden is on those who say there is such a contract, to shew that there is an intention to that effect appearing on the face of the titles; and I agree with the Court below, that the defenders have failed to make out that such an intention appears on the deeds here. I agree with them also in thinking that it is most convenient to begin by considering the effect of the feu charter of September, 1800, on which the defenders' title to the minerals, depends.

It appears on the face of it that Robert Houston Rae of Little Govan had in 1794 agreed to let some land, and the minerals under the whole of his estate, consisting of about 500 acres, for eighty years, to a firm consisting of himself and his brother Andrew Houston, under certain restrictions; and that disputes about that agreement between the brothers had been referred to Mr. Houston of Johnstone. Then follows this recital:—"And whereas I, the said Robert Houston Rae, having found it

(1) 8 H. L. C. 348. (2) Law Rep. 2 H. L., Sc. 286.

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expedient to bring my lands of Little Govan and others to sale, it becomes of importance to me, in order to promote the sales of my said lands, that the liberty of shanking and building houses and erecting machinery and making roads should be further restricted, which restriction was agreed to by him, the said Andrew Houston, on condition that the said Govan Coal Company should be paid an equitable consideration therefor; and that I, the said Robert Houston Rae, should, instead of a tack, grant to him, the said Andrew Houston and myself, as partners of the aforesaid coal company, a feu right of the said coal for payment of a feu duty equal to the rent that was to have been paid during the course of the said eighty years, and after the said eighty years for payment of one penny Scots per annum; and that I, the said Robert Houston Rae, should receive from said coal company an equitable consideration for granting said feu right instead of said lease, for ascertaining which considerations the parties have entered into a submission to arbitrators of date: and whereas the said Andrew Houston has executed a disposition to me of the aforesaid 17 acres 1 rood and 25 falls, and also of the property coal in the aforesaid lands of Little Govan, in order that, the same being vested in my person, I might be enabled to re-dispose the said coal and ironstone to him, the said Andrew Houston and myself, in feu as aforesaid, under the aforesaid restrictions." It seems rather strange that—though evidently quite alive to the importance, with the object of promoting the sale of the surface of the land, of securing the intended purchasers from the annoyance of open coal pits near their feus,—the parties should not have thought it desirable to say anything as to the method by which the working of the minerals from below should be managed, in order that the purchasers might be secure that it should be so as not to destroy the surface. It is probably accounted for by the fact that, in 1800 and till somewhere about thirty years later, minerals in this district, even when worked by the owner of the surface, who had full power to do what he pleased with it, were invariably worked by what is called "stoop-and-room," by which a quantity of the mineral was left undisturbed in stoops or blocks of sufficient strength to afford, as is alleged in the 9th condescendence, "absolute support to the surface;" and

though the answer does not admit that this was the effect of so working, I think we may take it that it was intended and supposed to have that effect, and that it was not anticipated by those who framed this deed that any other mode of working would be introduced. But whether this is the reason for it or not, there is no recital as to any agreement either to restrict or enlarge the right of support to the surface.

It appears that Robert Houston Rae had already, in 1800, granted feus of parts of the surface, and the feu of the minerals which he proceeds to grant is subject to those feu rights. What they were as to support we have no means of knowing, except in the case of six and a half acres of Shawfield Brae given to John Goudie in 1799, five years after the agreement to let the minerals to the firm of Robert Houston Rae and Andrew Houston, and one year before this charter of feu. The interest in that is now vested in the pursuers, and that feu charter is before the House. More must be said afterwards on the construction of that charter of 1799. It is enough at present to say that it contains no express terms to deprive the grantee of the right to support.

Robert Houston Rae had full power to deprive that portion of the surface which remained his own of all support. He had not power to deprive the portions which had been feued away of support, unless that power had been reserved to him in the titles by which the surface was feued. There is nothing, however, that I can see to indicate that those who framed the deed of 1800 made any distinction between the minerals under the portion of his estate in which he still had the dominium plenum of both surface and minerals, and that portion in which he had parted with the dominium utile in the surface. Both are granted in terms which are quite consistent with the right of support to the surface, being that which in the absence of some stipulation to the contrary the law would imply; the terms being the same where the grantor Robert Houston Rae was at the time of the grant of 1800 owner of the whole, and where he had already parted with the dominium utile, retaining only the superiority and the minerals. And without repeating the reasons given in the Court below, I quite agree in thinking that the provisions for referring to arbitration any question as to damage

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done by working the minerals are not sufficient to raise an implication that the right to support was abandoned.

The feu of the twenty-five acres of land, of which the respondents now hold half, was made in January, 1801, to Hill, Young, and Grahame, as trustees for a purchaser at an auction or roup held immediately after the execution of the charter of feu of the minerals "which was laid on the table at the aforesaid roup, and was referred to in the said articles of roup, and which is hereby referred and held as here repeated; declaring that the rules and regulations and provisions contained in the said feu right shall be the rule of proceeding and settlement between the said James Hill, Mr. John Young, and Robert Grahame, and their foresaids, and the feuars of the said coal and ironstone, anything above written notwithstanding." If I am right in thinking that the feu charter of 1800 gave the authors of the appellants no right to remove the minerals without leaving sufficient support, it is impossible, I think, to hold that anything in a charter containing such a declaration could do so.

The feu contract of the 14th of February, 1799, was entered into nearly eighteen months before the feu disposition of the minerals was executed, and four years after the agreement to let the minerals to Robert Houston Rae and Andrew Houston for eighty years. Neither the agreement then already made, nor that subsequently made, which very likely was then in contemplation, is referred to, and it may well be that John Goudie knew nothing about them. This deed, therefore, must be construed as it stands. The ground, it appears, was then occupied as a bleachfield, for which purpose the springs in it were important; and the portion of the deed which is material is so briefly expressed as to be obscure [reads as given ante, p. 835].

I do not know how the coal could be worked under these lands without injuring the springs; it would at least be very difficult to do so, and there must be some risk at all times, even when working by stoop-and-room, of some damage being done to the surface; the agreement to compensate for the damages may have reference to damages thus occasioned. I do not, therefore, think that there is enough in this passage to satisfy the burden that is cast on those who maintain that by this deed Goudie agreed for

himself and his successors that the minerals might be removed by Robert Houston Rae and his heirs and successors, without leaving sufficient support for the surface. And even if this was made out I think that the appellants claiming only under the feu charter of 1800, if it bears the construction which, as I have already said, I think it does, are not such successors as to have that right. For these reasons I move that the interlocutor appealed against be affirmed, and this appeal dismissed with costs.

LORD WATSON:—

I have come to the same result as the noble and learned Lord who has just spoken.

The law applicable to cases of this description is not doubtful. If A. conveys minerals to B., reserving the property of the surface; or if A. conveys the surface to B., reserving the property of the minerals below it, A. in the one case retains, and B. in the other gets, a right to have the surface supported, unless the contrary shall be expressly provided, or shall appear by plain implication from the terms of the conveyance. In order to make my views intelligible, I think it will be convenient to refer, first of all, to the mineral title of the appellants, and then to notice the separate titles by which the respondents hold the two contiguous parcels of land upon which their chemical works have been erected. In July, 1800, when the feu disposition which forms the basis of the appellants' title was executed, Robert Houston Rae, who had at one time been proprietor in fee of the whole surface, and subjacent strata of the lands of Little Govan and others, had feued out various portions of these lands, reserving the minerals therein. The contracts of feu contained provisions relating to the reserved minerals, and the assessment and payment of damage occasioned in working. It was plainly beyond the power of Mr. Rae, in granting the mineral feu disposition of 1800, to alter for the worse the position of those feuars who had antecedent rights; but it was undoubtedly within his power to lay restrictions upon his mineral disponees, to which he was not subjected by the terms of those prior feu contracts, and so to create a jus quæsitum in favour of the feuars. I am, however,

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unable to discover, in the terms of the feu disposition of July, 1800, aught to warrant the inference that Mr. Rae thereby created any new right in favour of those persons who had already obtained feu rights, or that he intended to do so. The very specific provisions of that deed, with regard to working and compensation, appear to me to be limited exclusively to the unfeued lands then belonging to the grantor. It was absolutely necessary to refer to the whole lands of Little Govan and others, whether feued or unfeued, for the purpose of defining the extent and boundaries of the minerals disponed; and accordingly these are described by the grantor as the "whole coal and ironstone"—not in "my lands" or "lands belonging to me,"—but in "the whole lands of Little Govan, &c." When we come, however, to the special provisions of the deed with respect to working, it is manifest that the powers to set down coal-pits, make coal hills, erect dwelling-houses, engines, and so forth, were never intended to apply to land which had ceased to belong to the grantor, having been already feued under the condition that the surface was not to be broken; and the partial prohibition of such operations is not made applicable to the lands of Little Govan, but to "the surface of the land belonging to the said Robert Houston Rae." And as might, in these circumstances, be anticipated, the compensation clause is also limited to the lands then held in fee simple by the grantor, the damages occasioned by the "aforesaid operations" to the "aforesaid lands" being payable to Mr. Rae and his heirs and successors, a stipulation which would be simply absurd if the damaged lands were the property of a feuar. This construction of the deed of 1800 is borne out by the fact that the working rights and consequent liabilities of the disponees, in regard to the coal and ironstone in those portions of Little Govan which had been already feued by Mr. Rae, are subsequently and separately dealt with. It is expressly provided that, in working these minerals, the disponees shall conform to the clauses and reservations contained in the feuars' titles. And, as one would naturally expect, damages arising in the course of these operations below the feuars' lands are made payable to the feuars themselves, the owners of the lands injured, and not to Mr. Houston Rae and his heirs and successors. That, under the

disposition of 1800, the feuars of the coal and ironstone are bound to give subjacent support to the surface of the then unfeued lands belonging to Robert Houston Rae, lying to the north of the line described in that deed, does not appear to me to admit of reasonable doubt. There is nothing whatever to sustain the inference that the feuars were to have power to let down the surface of these lands, which they were not entitled to break, upon the condition of paying compensation. The deed authorizes certain operations, for mining purposes, on the surface of part of the unfeued lands belonging to Mr. Rae, and the exigencies of the compensation clause are thoroughly satisfied by referring it to these operations.

The twenty-five acre parcel now in part belonging to the respondents is part of the unfeued lands on the north side of the line, for which Robert Houston Rae was entitled to support, as in a question with his mineral feuars. It was acquired by the respondents' predecessors in January, 1801, from Robert Houston Rae and his trust disponee, not by a contract of feu but by a deed of disposition and sale, which professes to vest in them all right, title, and interest in the lands which had previously belonged to Mr. Rae. That being so, the right of support must be held to have passed to the respondents, unless it can be shewn to have been excepted from the conveyance. But it is needless to dwell upon this point, because the feu disposition of July, 1800, is held as repeated in the disposition of January 1801, and it is declared that the regulations and provisions therein contained shall be the rule of proceeding and settlement between the disponees under the deed of 1801, and the feuars of the coal and ironstone.

The other parcel of land six and a half acres in extent stands, in my opinion, in a somewhat different position. I venture to think that the superior, when feuing his reserved coal and ironstone, in the year 1800, did not make any new provision in favour of the feuar of those six and a half acres; and consequently it appears to me that the respondents' claim for support to that ground depends entirely upon the terms of the original feu contract between Robert Houston Rae and John Goudie, dated the 14th February, 1799. By the terms of that contract the superior reserves the whole coal and ironstone and other metals and

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minerals in the lands feued, with full power and liberty to work and win the same, "so as not to break the surface of the said lands, or injure the springs therein, upon paying to the said John Goudie and his foresaids any damage that may be occasioned to the said lands by working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen."

By the terms of the clause which I have just quoted, the appellants contend that the superior must be held to have stipulated that he should have the right to cause subsidence of the surface by means of his underground workings, the only condition of his exercising the right being that he should pay for any injury thereby occasioned. Although the fact that the superior is prohibited from entering upon and breaking the surface of the feu for mining purposes, and the expression "upon payment," so far favour the appellants' argument, I do not think it is well founded. It appears to me to be impossible to hold that the somewhat ambiguous language of the clause impairs, by implication, the plain and positive prohibitions which it contains against breaking the surface. And I am certainly not prepared to hold that "breaking" the surface means simply digging into it from above, and does not also include every process by which the surface strata are disintegrated or disturbed, whether temporarily or permanently. If that be so, the implied right of the appellants, if they have any, must be to cause subsidence, without any disturbance or breaking of the surface. Long-wall working, which is the system followed by the appellants, produces temporary dislocation of the surface, which may be very injurious, as well as subsidence, except in cases where the seams of mineral worked are at a considerable depth and amply covered by rock or other solid strata. It may be possible in such cases to cause subsidence, without in any way breaking or disturbing the upper strata; and it is also possible that a mineral owner, in parting with his surface, might reserve power to create subsidence of that kind, and no other, upon paying damages. But the reservation must either be expressed or very plainly implied. It is not expressed here, but it appears to me that it might be held as implied in the language of the reservation, if it were perfectly

clear that the damage to be compensated was damage occasioned by the due and proper exercise of the reserved power of working. To my mind that is by no means clear; and keeping in view the fact that the superior is bound to work so as not to injure springs of water, I agree with the Lord President that the damage contemplated by the parties may be reasonably held to be damage arising from accident or negligence. I could not have agreed with his Lordship had the damage in question been described—as was the case in *Aspden* v. *Seddon* (1)—as "done to erections on the said plot by the exercise of any of the said excepted liberties," an expression which obviously refers to the proper use, and not to the abuse, of the liberties reserved.

LORD FITZGERALD:—

I concur in the judgments of the noble and learned Lords who have preceded me.

The rights of the parties must be governed by the construction of the instruments on which their titles rest, and the application of a rule which harmonises with the law of all parts of the United Kingdom. That rule has been already stated by the noble and learned Lord (Lord Blackburn). It rests on authority now beyond controversy, and is, in effect, that where the ownership of the surface and the ownership of the subjacent minerals have become separated and are vested in different proprietors, the owner of the surface has an apparent inherent right to necessary support from the minerals. If the owner of the minerals, on the other hand, alleges that he has not only the property in the whole minerals, but has also retained all proper means to make that property available, and amongst them a right to get at and remove the whole, though in doing so he may destroy the surface by removing its necessary supports, then he must shew by his title that he has such a right. It was asserted strongly in the argument that the burden lay on the defenders to establish that they had this right, and to shew it in clear and express terms; but, in a question of the construction of an instrument, it does not seem to be a matter of much importance on whom the burden

(1) Law Rep. 10 Ch. 394.

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lies. It is our duty to put a fair and reasonable construction on the instrument, having regard to the subject-matter and to the surrounding circumstances, so far as they are disclosed on the face of the instrument itself. If anything turned on the onus probandi, it would be open to the defenders to insist that the onus was shifted in this particular case, inasmuch as the principal deed (the feu charter of the 18th September, 1800, which is called the mineral deed), was a grant by the then owner in fee of both minerals and surface of "*all and whole, the whole* coal and ironstone, with full power to work and raise," &c., to which the maxim might be applicable, "concedere videtur et id sine quo res ipsa esse non potuit." It seems to me, however, that, whether the first deed was a grant of the surface reserving the minerals, or was a grant of the minerals retaining the surface, the question for your Lordships' decision remains the same. The question, then, on the construction of the mineral deed of 1800 is, whether the ownership of the surface was thereby so subjected to the ownership of the minerals that the owner of the minerals might, if necessary, in order to get the minerals, destroy the surface of the land north of the boundary line by withdrawing all mineral support, and thus causing its subsidence. In dealing with this question, I forbear to consider the provisions of the deed in detail. I could add nothing to the exhaustive criticism of the Lord President and desire to express my general concurrence in his observations. It seems to me that to give effect to the contention of the defenders would be to defeat the objects of Robert Houston Rae (the grantor) in relation to that portion of his lands of Little Govan lying to the north of the boundary line, as expressed in that deed, and I am of opinion that there is no provision to be found in that deed which would give the defenders a right to remove the minerals without leaving a sufficient support.

The view which the noble Lord (Lord Blackburn) has taken of the feu charter of 1800 renders it unnecessary for me to take up further time by discussing the other feu grants; but I desire to say that I did not in the course of the argument entertain any doubt that Robert Houston Rae did not, in the contract of 1799, except or reserve a right to remove the subjacent coal and minerals, so as

to leave no sufficient support to the surface and cause its subsidence, nor did John Goudie agree that such a right should be retained. H. L. (Sc.) 1883 DIXON v. WHITE.

Interlocutor appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 19th March, 1883.

Agents for appellants: *Grahames & Currey.*
Agents for respondents: *Murray, Hutchins & Stirling.*

[HOUSE OF LORDS.]

LEE . . . . . APPELLANT; H. L. (Sc.) 1883

AND

ALEXANDER . . . . . RESPONDENT. *Aug.* 3.

Conveyance of Heritage—Mid-superiority—Meaning of Clause "All other lands and others," following and concluding a Specific Enumeration and Description of Separate Subjects—When Reference to prior Letters to control Language of Dispositive Clause not allowed—Ambiguity.

According to the law of Scotland the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract in toto, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties; and a reference to an antecedent agreement is not warranted either by the fact that the subjects conveyed are described in general terms in the dispositive clause of the deed, or by the fact that, in the narrative of the deed, the parties are represented as having agreed upon certain points, which were presumably matters of stipulation, in any written agreement which preceded its execution.

Although subsidiary clauses of a deed may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause, yet if the terms of the dispositive clause are per se sufficient to give a right, they cannot be controlled by a reference to the other clauses of the disposition.

Where one of a set of heads in the dispositive clause of a disposition is expressed in general terms and concludes a specific enumeration and description of separate subjects, primâ facie, and unless the contrary appear, it must be presumed that it was merely intended to carry rights ejusdem generis with those previously described and disponed.

A completed disposition, dated 1879, and made inter alia by A. in favour of B. of certain superiorities, proceeded on the narrative that it was granted

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in consideration of an agreement between the parties. It conveyed to B. the dominium directum of separate parcels of land by five clauses. Of the land described in four the dominium utile had been conveyed by A. and his predecessors at various dates before 1873 out and out to the G. and S. W. Railway Company. None of these conveyances was of the nature of a feu right, and no mid-superiority was thereby created, and consequently the railway company held the lands thereby disponed (sect. 126 Lands Clauses Consolidation (Scotland) Act, 1845), under those who were the immediate superiors at the dates of the several conveyances in their favour. The 5th clause was, inter alia, in these terms: "And all other lands and others in the county of Ayr, parts of the said estates of Ballochmyle, ... and have been disponed by me," &c., to the said G. and S. W. Railway Company.

In 1878 A. had disponed an acre of land to the same railway for a reservoir, together with the servitude right of conveying water from it by means of pipes through his intervening lands to the railway station. That deed declares that the said acre of land and servitude are to be holden of the disponer in feu farm fee and heritage for ever; and the lands thus feued are described as parts of "all and whole the lands and tenandry of Ballochmyle and others, being the lands and others particularly described in a writ of clare constat granted by A. in favour of himself in 1864."

In 1863 A. had completed his title as superior under the Crown of "all and whole the lands and tenandry of Ballochmyle." In 1864 he made up a feudal title to the dominium utile of these lands by obtaining from himself, as his own immediate superior, the writ of clare referred to. These several estates of superiority and fee remain vested in A. under separate titles. The effect, therefore, of the feu-disposition of 1878 was to split the dominium utile of the acre of ground and its accompanying servitude rights, as vested in A. by the writ of 1864 into two estates; one an estate of fee belonging to the railway company, and the other a subordinate (yet independent) estate of superiority, belonging to A., interposed between his vassal's estate of fee and his own estate of superiority under the Crown. B., under the above 5th clause, claimed the mid-superiority of the acre of ground feued in 1878 to the railway company. A. adduced proof to shew that the land in question was misdescribed in the deed of 1878, that it did not "belong to the lands and tenandry of Ballochmyle," but was part and parcel of other lands; he also sought to refer to previous letters to shew what the contract was:—

Held, affirming the judgment of the Court below, but not on the same reasoning, that the evidence was not sufficient to discredit the description of the lands, the onus probandi being on A.; that there was not in the dispositive clause any ambiguity of expression such as to necessitate or justify a reference to the other clauses of the deed or to the previous letters for aid in its interpretation; but the terms of that clause did not sustain the claim made by B.

APPEAL from the First Division of the Court of Session, Scotland.

Colonel Claud Alexander, the respondent, and defender in the

Court below, succeeded to the fee simple estate of Ballochmyle in Ayrshire in 1861. J. B. W. Lee, a solicitor in the Supreme Court of Scotland, is the appellant and pursuer. The estate of Ballochmyle is of a composite character, partly held of the Crown and partly held of subject superiors; and until the transaction of 1879 after-mentioned, portions were held of the Loudoun family.

In 1851 the predecessor of Colonel Alexander, by disposition substantially in the form prescribed by Schedule A of the Lands Clauses Consolidation (Scotland) Act, 1845, sold, alienated, disponed, conveyed, assigned, and made over from him, his heirs and successors, to the Glasgow and South Western Railway Company, first his share in a piece of ground, being part of the solum of Loch Broom (which had been drained), lying partly in the parish of Mauchline and partly in the parish of Craigie; and, secondly, several pieces of ground, part and pertinents of his lands of South, East, and West Mossgiel or Mossgaril, Haughyett, Over and Nether Haughs, commonly called Kingancleuch, and others within the lordship and barony of Kylesmuir, parish of Mauchline, Ayr.

In 1873 Colonel Alexander, by two dispositions in similar terms as in the deed of 1851, conveyed to the same railway company two small pieces of land near the Mauchline Railway.

By feu-disposition dated the 1st of April, 1878, Colonel Alexander disponed to the same railway company, in consideration of the payment of an annual feu duty of £17, "All and whole that piece of land extending to one acre imperial measure, or thereby, lying in the parish of Mauchline and county Ayr. . . . And, in the second place, the heritable and irredeemable servitude, right, and tolerance of leading pipes from the reservoir formed by the said company on the piece of land in the first place before disponed, to the said company's railway station at or near Mauchline Station, ... as also the servitude, right, or tolerance of collecting water in the said reservoir at all times . . . . which piece of land before disponed is part and portion of all and whole the lands and tenandry of Ballochmyle and others, in the county of Ayr, being the lands and others particularly described in the writ of clare constat granted by me as immediate lawful superior

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of said lands, in favour of myself as eldest son, &c., dated the 28th, and recorded in the register of sasines on the 31st days of May, 1864."

The question was whether Colonel Alexander is to be held to have conveyed the mid-superiority of this piece of ground to Mr. Lee, by the terms of the 5th clause of a disposition in Mr. Lee's favour, dated December, 1879, granted by Messrs. Mackie and Dunlop (the Loudoun Commissioners), and to which the respondent was a party.

It appears from the documents and admitted facts that in 1878, on the decease of the Marquis of Hastings, Earl of Loudoun, the estates of the Loudoun family were placed into the hands of two commissioners, Messrs. Mackie and Dunlop, for sale, and division of the price among the heir portioners of the Marquis. At a roup of these, and subsequently by private bargain, Mr. Lee purchased from the commissioners the superiorities, inter alia, of certain lands of the estate of Ballochmyle. Thereafter Colonel Alexander negotiated with Mr. Lee for the sale to him (Colonel Alexander) of the superiorities of his land thus bought, including the superiorities of those portions which had been sold out and out to the railway company; and it was agreed that the price should be £1750. Doubts having arisen as to whether the superiority of the lands of Mossward and others were included in the purchase, Mr. Lee offered at a meeting with Colonel Alexander's agents to sell the said superiority for £30, provided he was allowed to retain the superiority of the lands sold by Colonel Alexander and his predecessors to the railway company; and accordingly he wrote the following letter, the terms of which were accepted on the same day:—

Oct. 13, 1879.

Dear Sirs,—In addition to what I have already sold to Colonel Alexander, I hereby offer to sell to him for the sum of £30 additional—(1) Thirteen acres called Mossward; (2) Andrew Allan's house and yard; (4) Three acres, two roods, and thirty-one poles, called Newlands; and (5) Three and a half acres, called Rodding or Redding, being parts of sub-branch two of Lot 20 of Particulars of Sale of Mauchline, &c.; and in respect that I am to be allowed to retain or am to have conveyed to me the superiority of all the subjects and lands which belonged to Colonel Alexander or his predecessors, and sold to the Glasgow and South Western Railway Company, I hereby offer further to convey to the Colonel all other right and interest which I have or may have in and to the

superiorities and feu-duties and casualties of and pertaining to the estate of Ballochmyle, as presently held and possessed by Colonel Alexander, the Colonel *consenting* to the disposition in my favour of the superiority of the parts sold to the railway company as aforesaid. The conveyance to be granted by the heirs of the Loudoun family with my consent, and to have warrandice from fact and deed only.

A question having arisen whether the superiorities of certain lands, Mossgavil, Loch Broom, and others, of those conveyed to the railway company, belonged to the Loudoun family or to Colonel Alexander, the latter was made a party to the deed, dated December, 1879, made by the Commissioners for the Loudoun family, Mackie and Dunlop. That deed proceeds on the narrative, inter alia, that the Loudoun family had sold to Mr. Lee the superiority of various lands, and among others of land the dominium utile whereof belonged to Colonel Alexander: that Mr. Lee had resold to Colonel Alexander, at the price of £1780, the dominium directum of the said lands and others therein mentioned, and certain other lands, so far as belonged in property to Colonel Alexander, on the condition, inter alia, "that Mr. Lee was to be allowed to retain, or was to have conveyed to him, the superiority of all the subjects and lands which had belonged to Colonel Alexander or his predecessors, and had been sold by them to the Glasgow and South-Western Railway Company." It then narrates that the dominium utile of the subjects particularly disponed in the sequel of the deed, had been disponed to the railway company in 1851 and 1873. And the narrative then proceeds: "And whereas the superiority or dominium directum of the lands of Over and Nether Haughs, commonly called Kingancleuch, and others, of which, together with other land, the subjects first and second after disponed form a part, was vested in the constituents of us, the said Robert Mackie and Alexander Milne Dunlop; and whereas the dominium directum, or superiority of the lands of Mossgavil, Loch Broom, and others, of which some portions of the subjects hereinafter disponed form, or may be held to form parts, belongs to, and is vested in me, the said Claud Alexander." The dispositive clause immediately follows in these terms: "Therefore, in consideration of the sum of 100*l.* now paid to us, the said Robert Mackie and Alexander Milne Dunlop, as factors

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and commissioners foresaid, by the said J. B. W. Lee further on account of the price of said subjects purchased by him from us as said is, and of the agreement made by me, the said Claud Alexander, with the said J. B. W. Lee, for the purchase of the said superiorities, we, the said Robert Mackie and Alexander Milne Dunlop, as factors and commissioners foresaid, so far as regards the lands, the superiority of which was vested in our constituents as before-mentioned, and I the said Claud Alexander, so far as regards the subjects, the superiority of which is vested in me as before-mentioned, do hereby dispose to the said J. B. W. Lee." Then follows a full description, in separate articles, numbered first, second, third, and fourth, of the subjects conveyed to the railway company in 1851 and 1873, and this is followed by the clause upon which the appellant founds his present claim. It is in these words: "And, fifth, all other lands and others in the county of Ayr, parts of said estates of Ballochmyle and others which belonged to me, the said Claud Alexander, and my predecessors, and have been disponed by me or them to the said Glasgow and South-Western Railway Company." Colonel Alexander denied that the acre of ground conveyed to the railway company on the 1st of April, 1878, was intended to be included in the conveyance of 1879.

Mr. Lee thereupon raised this action for declarator that he "had now the only good and undoubted right and title to the superiority or dominium directum and all other rights which belonged to the said Claud Alexander, in that acre of ground as of the date of the disposition of December, 1879," which piece of land and others before described are part and portion of all and whole the lands and tenandry of Ballochmyle and others in the county of Ayr.

The railway company were made a party to the action, but being ready and willing to pay the feu duty to the party proved to be entitled to the superiority in question, they did not appear in this appeal.

Colonel Alexander adduced proof to shew that although the said acre of land was described in his own feu contract of 1878 as of the estate of Ballochmyle that was an error; the land in question being a portion of the estate of Welton, held by him of

A. Campbell of Catrine, with whom he had entered; and therefore the superiority of those lands was never in possession of the Loudoun family nor formed part of the said baronies, but was held of the proprietor of the time being of the neighbouring estate of Catrine. He also referred to the previous letters to explain the deed. His material plea in law was (4) "on a sound construction of the disposition libelled, and separatim of the said disposition and relative missive letters narrated therein, the pursuer was only entitled to retain or to have conveyed to him the superiority of subjects which had been held of the Earls of Loudoun, and which had been sold to the railway company; and as the subjects in question are not of that character, the defender should be assoilzied."

On the 24th of November, 1882, the First Division pronounced an interlocator, recalling a judgment pronounced by the Lord Ordinary (1) 21st March, 1882; and assoilzied the respondent from the conclusions of the summons (2).

On appeal,

July 23, 24, 26. *The Lord Advocate* (*Balfour*, Q.C.), and *J. Campbell Smith*, were heard for the appellant. Their arguments are sufficiently referred to in the Law Peers' opinions. They cited (correspondence prior to settled deed cannot be used to control deed) *Inglis* v. *Buttery* (3); *Morton* v. *Hunters & Co.* (4); *Hughes* v. *Gordon* (5); Bell's Commentary (7th ed.) pp. 456, 457; Chitty Junior on Contracts (8th ed.) pp. 76, 84.

The Solicitor-General for Scotland (*Asher*, Q.C.), and *W. Mackintosh*, appeared for the respondent, but were not called upon.

The House took time for consideration.

Aug. 3. LORD WATSON:—

This action relates to a subaltern right of superiority, which was created by the respondent on the 1st of April, 1878.

(1) Lord McLaren.
(2) 10 Court of Sess. Cas. 4th Series, 230.
(3) 3 App. Cas. 552.
(4) 4 W. & S. App. 379, at p. 386.
(5) 1 Bl. App. Cas. 287.

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It appears that the respondent succeeded to the estate of Ballochymle in 1861, and that in 1863 he completed his title as superior under the Crown of "all and whole the lands and tenandry of Ballochmyle." Then, in 1864, he made up a feudal title to the dominium utile of the lands and tenantry of Ballochmyle, of which he is also the proprietor, by obtaining from himself, as his own immediate superior, the writ of clare referred to in the feu disposition in favour of the railway company. These several estates of superiority and fee remain vested in the respondent under separate titles, and have never been consolidated. Accordingly, on the assumption that the land feued is therein correctly described, the effect of the feu-disposition of the 1st of April, 1878, was to split the dominium utile of the imperial acre and its accompanying servitude rights, as vested in the respondent by the writ of 1864, into two estates; the one an estate of fee belonging to the railway company, and the other a subordinate, yet independent, estate of superiority belonging to the respondent, interposed betwixt his vassal's estate of fee and his own estate of superiority under the Crown.

The respondent in his record averred that the land included in the feu-disposition of 1878 was therein misdescribed; that in point of fact it did not form part of the lands and tenandry of Ballochmyle, vested in him by the writ of clare of 1864, but is part and parcel of the lands of East Welton, which are held by him in fee, under the proprietor of the estate of Catrine, as his immediate feudal superior. That allegation was denied by the appellant; and upon this point proof was adduced by both parties, in which the respondent led by appointment of the Lord Ordinary. The proof so taken does not appear to me to be either clear or conclusive. Taking it per se, and irrespective of any question of onus, I am inclined to think the preponderance of the evidence is in favour of the land in question being part of East Welton. But the appellant is entitled to take his stand upon the terms of the feu-disposition, which are clear and unambiguous; and the burden of shewing that the description which, so recently as the year 1878, he inserted in the title which he gave to his vassals, is erroneous, rests upon the respondent. In that aspect of the case, I am of opinion that the evidence is not sufficient to discredit

the description of the land which occurs in the feu-disposition by the respondent to the railway company.

The sole object of the action in which the present appeal is taken is to have it judicially found and declared that the mid-superiority so created by the respondent upon the 1st of April, 1878, has been conveyed, and now belongs to the appellant, by virtue of a deed of disposition in his favour, executed by the trustees of the Loudoun estates in Ayrshire, and also by the respondent in the month of December, 1879. That deed conveys to the respondent the dominium directum of five separate lots or parcels of land. As to the first, second, third, and fourth parcels, no controversy arises. The dominium utile of these four parcels as it stood vested in them was conveyed by the respondent and his predecessor, the late William Maxwell Alexander, to the Glasgow and South Western Railway Company, at various dates in and prior to the year 1873. None of these conveyances was of the nature of a feu right, no mid-superiority was thereby created, and consequently the railway company held the lands thereby disponed to them (subject to the provisions of sect. 126 of the Lands Clauses (Scotland) Act, 1845) under those who were the immediate superiors at the dates of the several conveyances in their favour. Accordingly, it does not admit of dispute that in the case of each of those four parcels of land the superiority right, in so far as conveyed by the respondent, and not by the Loudoun trustees, to the appellant under the disposition of December, 1879, was part of the respondent's estate of superiority of the lands and tenandry of Ballochmyle, held by him immediately under the Crown.

The fifth lot or parcel, included in the disposition of December, 1879, is described in these terms [reads as given ante, p. 858]. It is upon these words of description, occurring in the dispositive clause of the deed, that the right which the appellant asserts to the mid-superiority in question is rested, because the other clauses of the deed are not favourable to his claim. The appellant contends (and, in my opinion, his contention is well founded) that if the terms of the dispositive clause are per se sufficient to give him the right which he asserts they cannot be displaced or controlled by a reference to the other clauses of the disposition. The

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language in which these subsidiary clauses are expressed cannot be permitted to override plain words of disposition, although it may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause.

I do not find, in the dispositive clause upon which the present case depends, any such ambiguity of expression as to necessitate or justify a reference to the other clauses of the deed for aid in its interpretation; but I am of opinion that the terms of that clause do not, according to their just construction, sustain the claim made by the appellant.

The fifth head or parcel of the conveyance is expressed in general terms, "All other lands and others in the county of Ayr," and it follows and concludes a specific enumeration and description of four separate heads or subjects. Primâ facie, therefore (and unless the contrary appear), it must be presumed that the fifth head of the disposition was merely intended to carry rights ejusdem generis with those previously described and disponed, and was not intended to convey a superiority right of a totally different character. Then, in the fifth head, the expression, "all other lands and others in the county of Ayr," does not stand alone, but is qualified by the addition of these words, "part of said estates of Ballochmyle and others." There can be no doubt that the reference back, implied in the words "said estates" is to the previous description of these estates as "all and whole the lands and tenandry of Ballochmyle and others in the county of Ayr, being the lands and others particularly described in the writ of clare constat granted by me, the said Claud Alexander, as immediate lawful superior of the said lands, in favour of myself as eldest son, and nearest and lawful heir, of the deceased Boyd Alexander of Ballochmyle and Southbar, dated the 8th and with warrant of registration thereon recorded in the general register of sasines on the 31st days of May in the year 1864."

Had the respondent been successful in establishing his allegation that the land feued by him to the railway company in 1878 was part of East Welton, that would have been fatal to the appellant's case; because the respondent was not, at and prior to the 1st of April, 1878, the immediate lawful superior of the lands of East Welton, nor are these lands comprehended in the writ of

clare constat thus referred to. But, as I have already stated, it is my opinion that, for the purposes of this case, the land feued to the company must be held to be part of the lands and tenandry of Ballochmyle which belonged both in fee and superiority to the respondent in 1864. I say "for the purposes of this case," because nothing that your Lordships may determine now, as between the appellant and respondent, can prejudice the owner of the Catrine superiority, or prevent his establishing that he and not the respondent is the immediate over-lord of that estate which comprehends both the fee feued to the railway company and the mid-superiority which is the subject-matter of the present action.

I assume, then, that the subjects feued in 1878 lie within the proper lands and tenandry of Ballochmyle. As I have already pointed out, it is the necessary consequence of that assumption that the respondent became vested in two distinct rights or estates of superiority affecting the railway company's feu, the one held under the Crown, and the other held under himself as the vassal of the Crown. Now the respondent does not profess to convey to the appellant, by the descriptive language above quoted, all rights of superiority which might be vested in his person affecting the land in question. He only conveys the dominium directum of the lands and others particularly described in the writ of clare constat of May, 1864. I do not think the description of the superiority conveyed can be reasonably held to embrace the mid-superiority of 1878. That mid-superiority is part and parcel of the lands, or, in other words, of the estate of fee described and vested in the respondent by the writ of clare constat. The only superiority which can with any propriety be described as the dominium directum of the lands particularly described in that writ of clare constat is the respondent's Crown superiority, in virtue of which he gave himself warrant of infeftment, as his own vassal, in the dominium utile of those lands. If at any time after the 1st of April, 1878, the respondent had been so rash as to enter into a contract of sale, binding himself to dispone the dominium utile of the whole lands described in the writ of clare constat without an exception, express or implied, of the railway company's feu right, or of his own mid-superiority, I can see no reason to doubt that he would thereby have incurred an obligation to convey both

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rights to the purchaser, because the mid-superiority is, just as much as the railway feu, an integral part of the lands themselves, of the dominium utile as distinguished from the dominium directum, according to the description given in the writ. And seeing that the appellant has only got a conveyance to the dominium directum of the lands, as these are particularly described in the writ of clare constant, it appears to me to follow, ex paritate rationis, that he cannot successfully claim under his conveyance that which is described in the writ as an integral part of the dominium utile.

Hitherto I have only noticed the language employed in the dispositive clause to describe the subjects conveyed. The subjects so described are not conveyed by the respondent in terms absolute and without qualification. On the contrary, the respondent dispones to the appellant, his heirs and assignees or disponees whomsoever, the subjects thereinafter described, subject to the qualification expressed in the words "so far as regards the subjects, the superiority of which is vested in me as before mentioned." The reference implied in these last words is a link in the narrative part of the deed which runs thus,—"And whereas the dominium directum, or superiority, of the lands of Mossgavil, Loch Broom, and others, of which some portions of the subjects hereinafter disponed form, or may be held to form, parts, belongs to and is vested in me the said Claud Alexander" (the respondent). The effect of the qualification as explained by the reference shortly stated is this, that the respondent does not dispone, or profess to dispone, the whole superiorities described in the dispositive clause, but only such portions of them as formed, or might be held to form, parts of his own dominium directum, or superiority of the lands of Mossgavil, Loch Broom, and others.

In construing the dispositive clause of a deed of conveyance, proper words of disposition are of greater significance than mere words of description, and expressions used for the purpose of limiting the scope of dispositive words lose none of their force because the language subsequently employed to describe the subjects conveyed goes beyond that scope. In the present case the qualification of the word "dispone," as used by the respondent, was obviously introduced for the very purpose of limiting

the general descriptions which followed, descriptions which were framed so as to include not only what the respondent intended to convey, but what was meant to be conveyed by the Loudoun trustees.

I am accordingly of opinion that the dispositive clause gives the appellant no right to the mid-superiority of the railway company's feu, unless he can establish that such mid-superiority forms, or may be held to form, part of the respondent's dominium directum, or superiority of "the lands of Mossgavil, Loch Broom, and others." It appears from the writ of clare constat of May, 1864, that the lands of South Mossgavil, as well as the lands of East and West Mossgavil, and the lands of Loch Hill (which include the respondent's share of the solum of Loch Broom (now drained by the operations of the railway company), with the parts, pendicles, and pertinents of the same, are all proper parts and portions of the six-merk and forty-penny land of old extent of Mossgavil, and that the respondent is the immediate superior of these lands of Mossgavil and Loch Broom, in virtue of the estate of superiority which he holds directly under the Crown. The appellant did not venture to assert that the land included in the feu of 1878 is part of the lands of Mossgavil or Loch Broom; and it is in vain for him to contend that the mid-superiority of the feu forms part of the Crown superiority, the only dominium directum embracing these lands which is vested in the respondent. Even if the appellant had shewn (what he has entirely failed to establish) that the railway company's feu does in point of fact form part of the lands of Mossgavil, he would still have failed to shew that the mid-superiority which he claims either forms, or could in any reasonable sense be held to form, any portion of that dominium directum, some parts or portions of which are all that the respondent dispones to him.

The learned counsel for the appellant did, no doubt, maintain before your Lordships the somewhat desperate argument that "the lands of Mossgavil, Loch Broom, and others," must be held to include not only the lands of Mossgavil and Loch Broom, but also to include, if not the whole other lands wherever situated belonging in superiority to the respondent, at least his whole other lands forming parts of the estate of Ballochmyle, and

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comprehended in the writ of clare of 1864. All I can say is this, that to put such a construction upon these words "and others" as they occur in connection with the lands of Mossgavil and Loch Broom, would be to give them for the first time a meaning which has never been attributed to them in Scotch conveyancing, and which, in my opinion, they do not naturally bear. The words are constantly used with great propriety by conveyancers, as a short substitute for the detailed clause of parts, pendicles, and pertinents which is inserted in a full and particular description of lands, such as is to be found in the writ of clare constat.

Although I have come to the same conclusion as the learned judges of the First Division of the Court, in regard to the merits of the appellant's case, I have thought it necessary to explain fully the considerations which have led me to that conclusion, because I am unable to concur in all the reasons which have been assigned for their judgment by the Court below.

I do not think there is any ambiguity in the language of the disposition of December, 1879, which can justify a reference, for the purpose of controlling that language, to an antecedent agreement between the appellant and the respondent. Nor do I think that such a reference is warranted, either by the fact that the subjects conveyed are described in general terms in the dispositive clause of the deed, or by the fact that, in the narrative of the deed, the parties are represented as having agreed upon certain points which were presumably matter of stipulation in any written agreement which preceded its execution. In the present case, the deed narrates that the appellant and respondent had previously arranged certain terms and conditions, but it makes no mention of any document in which these are to be found. Even if the narrative had borne that these terms and conditions had, inter alia, been agreed to by missive letters of the 13th of October, 1879, that would not, in my opinion, have made these letters admissible evidence for the purpose of controlling or qualifying the language of the deed. According to the law of Scotland, the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract in toto, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the

contracting parties. To admit the letters of October, 1879, for the purpose and for the reasons explained in the opinions of the Lord President and of Lord Mure would, in my humble opinion, be inconsistent with the principles which ought to govern the construction of a probative deed of conveyance.

I move that the interlocutor appealed from be affirmed, and that the appeal be dismissed, with costs.

EARL OF SELBORNE, L.C. :—

At the conclusion of the argument in this case I made a note of the view of it which I at that time took; and finding, as I do, that the reasons which I was prepared to assign for my conclusion are the same with those which have been stated to your Lordships by my noble and learned friend who has just moved the judgment of the House, I abstain from repeating them.

The only point on which I wish to add a single word, as to the construction of the deed, is this. The argument for the appellant was mainly rested upon the ground that under the fifth head, according to the construction which is placed upon the deed by the respondent, nothing would pass. That is an argument always entitled to some weight, but not by any means of a conclusive character. There are two purposes for which a clause of this kind, expressed in general words, may be introduced into a deed—one is to pass some particular property not comprehended in the previous parcels, but another is to pass anything which may not have been exactly in the view of the parties at the time, or specifically identified, but which would come within the general intention expressed in the previous part of the deed, and might possibly not be sufficiently described or comprehended in the particular parcels. Now on the face of this deed it appears to me, that the latter, and not the former, is the object of this clause; because, if it had been intended to pass this particular parcel of land, the reservoir in question (and it is not alleged that there was anything else which it could possibly pass not comprehended in the previous parcels), why in the world was not the reservoir expressly mentioned and described, as the other four parcels were? That is to my mind conclusive against the notion that it was the particular purpose of this clause to pass the

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reservoir, expressly as such; and, that being so, I look upon the clause as introduced ex cautelâ, for the purpose of including and sweeping in anything which might possibly have been omitted in the previous description.

I entirely agree with my noble and learned friend that for the purpose of this question we are obliged to discharge from our minds the previous letters or missives which contained the terms of the agreement between the parties. I doubt whether, even if we could have looked at them, it would have been satisfactory to have to rely only upon some of them, without seeing all that had passed leading up to the contract; but, to me, it is clear that, although missives of that description might be material for the purpose of reduction on the ground of essential error, they are not material or admissible for the purpose of the construction of a deed. To me, my Lords, it is of the less importance, because when I look at the missives in this case, the principal ones, those upon pages 75 and 76 (of the printed case), do not appear to me to be at all more clear than the deed itself. I agree that there is an explanatory note, interjected afterwards by Mr. Lee, which perhaps may be more clear; at the same time even that is, after all, but an imperfect description of the whole agreement. Therefore I do not think that we lose very much by not looking at those missives; and it is not clear to me that the Lord President and Lord Shand (I do not speak of Lord Mure) really proceeded upon the ground of those missives, although undoubtedly they thought themselves at liberty to refer to them. And perhaps there is a great temptation to refer to that which satisfies you that the construction which you put upon an instrument is in accordance with the previous contract and intention of the parties. That temptation it is, however, not well to yield to, except when the documents can be legitimately referred to for the purpose of construction. But I find at pages 64 and 65 in the Lord President's opinion (1), and at page 67 in Lord Shand's, in the last sentence (2), clear evidence that, upon the pure question of construction, those two learned Lords took exactly the same view which your Lordships take, and would have come to the same conclusion even if they had not referred to the missives at all. Therefore

(1) 10 Court Sess. Cas. 4th Series, at pp. 237, 238. (2) Ibid. at p. 239.

we really do not differ from the Court below in our mode of reaching the same result; for the grounds which we take are grounds which were also taken in the Court below.

It is the more satisfactory to me to come to this conclusion, because the real truth is that the judgment of the Lord Ordinary, which was the other way, could not, in my opinion, have stood upon the ground which the Lord Ordinary himself took. He was of opinion, that it was a conclusion which might properly be drawn from the evidence, that the reservoir in question was part of the Welton lands held by Mr. Campbell of Catrine. If it had been so, it would have been to my mind perfectly clear, upon the construction of this deed, that it did not pass by the deed. But I agree with my noble and learned friend who has just addressed your Lordships, that, if the case had depended upon that, the onus probandi would have been upon the Respondent, and that the evidence produced by him in the face of his own declarations in his own instruments of title would not have been enough for that purpose.

LORD BLACKBURN:—

At the conclusion of the argument for the appellant in this case I, in common with, I believe, everyone of the noble and learned lords present, thought that the interlocutor appealed against should be affirmed, though not on the ground assigned by the Lord President and Lord Mure, for I do not think that there is any ground for incorporating the letters of the 13th of October, 1879, or any of the previous communings between the parties, in the subsequent disposition of December, 1879, so as to affect its construction. If the now respondent had sought to set aside the disposition he might have used those communings for the purpose of making out a case for so doing; whether he could have succeeded or not I do not say; I have not before me the whole materials for solving that question. But I concur in the view, very briefly expressed by Lord Shand, that "On the question as one of construction of the conveyance" the interlocutor was right.

I take the canon of construction to be that where the description of the premises assigned is clear and unambiguous, effect

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must be given to it by the Court, even though convinced from other parts of the deed that it was not what the parties meant to say. But general words following a specific description rarely, if ever, clearly and unambiguously express that everything which may come within that general description is to pass. They may, and more commonly do, mean that if there is anything which virtually and in substance is part of the thing described, though it may be not perfectly described, that shall pass; and consequently I think it is legitimate to look at the narrative in the deed, and still more at the dispositive words used, in order to see whether there appears on the face of the conveyance a sufficient indication that it was intended to restrict those general words, secundum subjectam materiem. I think that there is a sufficient indication of such an intention on the face of this conveyance.

I have had the advantage of perusing in print the opinion of Lord Watson, in which I quite concur, and I do not think it necessary to go over it in order to point out the parts of it which chiefly weigh with me.

The question is whether under the fifth subject the appellant is entitled to have the superiority, carrying with it a feu duty of £17 per annum, of a reservoir and pipes granted in feu on the 1st of April, 1878, by the respondent to the Glasgow and South Western Railway Company. It is a matter of dispute whether that superiority was "part of the estates of Ballochmyle." I assume, without deciding, that it was. It is not asserted that it was part either of Mossgavil or Loch Broom, nor that there was any pretence for saying that it could be held to be part of any of the four subjects specifically described which, as we must take it from the construction of the instrument, formed, or might be held to form, parts of Mossgavil or Loch Broom; but it was said that it was "other lands" which had been disponed to the Glasgow and South Western Railway Company, and that the respondent's agents ought to have objected to this general description and required it to be confined to "other lands, if any, which may form or be held to form parts of the four subjects specifically described" or some similar form of words. It would have been better if they had done so, for it might have saved a lawsuit; but I cannot come to any other conclusion than that the whole of the

conveyance, more especially the form of the dispositive clause referring to the narrative, that the subjects formed, or might be held to form, part of Mossgavil and Loch Broom, sufficiently indicates an intention to restrict the general words in that manner. If the appellant really thought that the respondent had sold to him the superiority of this reservoir (which I can hardly suppose) he ought to have taken care that the intention to convey it was expressed in the disposition by less ambiguous words.

LORD FITZGERALD :—

The question before us is whether the dispositive clause contained in the disposition of the 26th of December, 1879, gave the pursuer a right to the mid-superiority of the railway company's feu arising under the feu-disposition of the 1st of April, 1878. My Lords, I have listened to the clear and very learned judgment of the noble and learned Lord opposite (Lord Watson) in which I entirely concur, and to which I can add nothing with advantage. The noble and learned Lord has shewn us that there is no such ambiguity in the language of the instrument of the 26th of December, 1879, or in the description of its subject-matter, as would render it necessary to resort to the previous correspondence, if it was open to us to do so, and that a clear construction of that instrument can be arrived at on the terms of the instrument itself without resort to any extraneous or antecedent matters. But, my Lords, in affirming the interlocutor of the First Division in favour of the defender on the merits, I desire also to guard myself against any apparent adoption of the ground on which that interlocutor seems, at least in the opinion of two of the judges, partly to rest. From the judgment of the Lord President it would appear that the Court considered that on the face of the instrument there was ambiguity as to the intentions of the parties, and that to clear away that ambiguity it was necessary and open to the Court to resort to the missive letters constituting a prior preliminary agreement. His Lordship is represented to have said, "That agreement is not set out in extenso, but as it is the consideration on which the disposition proceeds, it appears to me that in construing the disposition we are entitled to resort to the agreement itself for light on its meaning. In saying this, I wish carefully to guard against it being supposed that I am in any way

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violating the well-known general rule of law as to the construction of written instruments, viz., that no recourse can be had to previous informal missives which preceded it. I desire to respect that rule, but where, as in the present case, the conveyance is ambiguous, and direct reference is made to the preceding agreement as the condition of granting the disposition, then I do not doubt that the Court may take any light they can get from it. Now that agreement is contained in a long correspondence, the result of which is stated in the third article of the defender's statement on record. This preliminary agreement is referred to in the instrument of disposition once only, and in these terms; "and of the agreement made by me, the said Claud Alexander, with the said J. B. W. Lee for the purchase of the said superiorities, we, the said Robert Mackie and Alexander Milne Dunlop, as factors and commissioners foresaid, so far as regards the lands the superiority of which was vested in our constituents, as before mentioned." It is observable that it does not refer to or ear-mark any particular documents as constituting the agreement. On this subject my noble and learned friend states what is the law of Scotland, to the effect that the formal conveyance when executed supersedes the previous contract and becomes the measure of the rights of the parties. But, my Lords, it is not only the law of Scotland but of the United Kingdom, that if a previous treaty or correspondence results in a final and distinct written agreement, the prior correspondence cannot, as a general rule, be resorted to in order to construe the agreement by which it has been superseded and discharged. On this question I adopt the opinions expressed by the Lord Chancellor and the noble and learned Lords who have preceded me, that it was not open to the Court to resort to the prior correspondence constituting, as alleged, the preliminary agreement for the purpose of explaining or of aiding in the construction of the final disposition of December, 1879.

Interlocutor appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 3rd August, 1883.

Agent for Appellant: *A. Beveridge.*
Agent for Respondent: *W. A. Loch.*

[HOUSE OF LORDS.]

CLIPPENS OIL COMPANY AND ANOTHER APPELLANTS; H. L. (Sc.)
1883
AND *Feb.* 23.
HENDERSON AND ANOTHER . . . . . RESPONDENTS.

Patent, Infringement of.

APPEAL from a judgment, dated Dec. 3, 1881 (1), of the Second Division of the Court of Session, Scotland, granting an interdict against the appellants for infringement of the respondents' patent.

No general principle of law was involved.

On appeal,

Sir *F. Herschell*, S.G., and *Webster*, Q.C., were heard for the appellants.

The Lord Advocate (*Balfour*, Q.C.), and *Aston*, Q.C., for the respondents, were not called upon.

THE HOUSE (Earl of Selborne, L.C., and Lords Watson, Bramwell, and FitzGerald) affirmed the decision of the Court below, with costs.

Agents for appellants: *Grahames, Wardlaw, & Curry.*
Agent for respondents: *A. Beveridge.*

(1) 9 Court of Sess. Cas. 4th Series, 232.

[HOUSE OF LORDS.]

H. L. (E.) 1883 July 16.

MILDRED, GOYENECHE & Co. . . . . APPELLANTS;

AND

MASPONS, Y HERMANO . . . . . RESPONDENTS.

Principal and Agent, undisclosed Principal—Privity of Contract between Principal and Consignee—Money had and received—Notice or Knowledge—Set-off—Factors Act (6 *Geo.* 4 *c.* 94) *s.* 1.

Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—

Held, affirming the decision of the Court of Appeal, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything except the premiums stamps and commission in respect of the insurance.

Held also by Lord Blackburn that the case fell within the Factors Act (6 Geo. 4 c. 94) s. 1.

Sed *quære* by Lord FitzGerald.

APPEAL by the defendants from an order of the Court of Appeal (Jessel M.R. Lindley and Bowen L.JJ.) reversing a judgment of Manisty J. in favour of the defendants (1).

The facts which are stated in the judgment of Lord Blackburn are also set out in the report of the decision below (2).

(1) 9 Q. B. D. 530.

(2) The date when the policies of insurance were actually executed was the 18th of August, and not the 18th of September, as stated in 9 Q. B. D. at pp. 533, 540.

June 8, 11, 12. *Cohen* Q.C. and *Davey* Q.C. (*Arbuthnot* with them) for the appellants:—

The Court of Appeal were wrong on both grounds of their judgment, i.e. in holding 1. That there was privity of contract between the plaintiffs and defendants; 2. That the defendants had no right of set-off. 1. There was no privity of contract between the appellants and respondents: *New Zealand &c. Land Co.* v. *Watson* (1). If the agent has authority to establish privity between his principal and the person with whom the agent deals the principal can be sued, not otherwise: *Armstrong* v. *Stokes* (2); *Hutton* v. *Bulloch* (3). The owner of the goods cannot set up his title or sue except in the right of Demestre & Co. *Elbinger Actien Gesellschaft* v. *Claye* (4) resembles the present case in principle. If Mildred had not effected the insurance Maspons could not and Demestre & Co. could have sued them. The Spanish law is material as shewing that the agents had no authority to bind their principals or to make a contract between the principals and the defendants. 2. The defendants as consignees had a general lien on the cargo or proceeds: Story on Agency §§ 111, 375, 376; *Godin* v. *London Assurance Co.* per Lord Mansfield (5); 2 Duer on Insurance p. 285; 1 Arnould on Insurance, 5th ed. pp. 210–213; *Mann* v. *Forrester* (6); *Westwood* v. *Bell* (7). There being an intention by all parties to effect an insurance on the 3rd of August the defendants were in the same position as if it had been effected: *Xenos* v. *Wickham* (8).

Sir *F. Herschell* S.G. and *Gorell Barnes* for the respondents:—

The Court of Appeal was right on both grounds. The general rule is that an undisclosed principal may sue on a contract made by his agent, except in certain excepted cases of which this is not one. The inconveniences pointed out in the dicta in *Armstrong* v. *Stokes* (9) of suing or being liable to a foreign principal exist as strongly where (as here) the agent as well as the

(1) 7 Q. B. D. 374.
(2) Law Rep. 7 Q. B. 598, 604.
(3) Law Rep. 9 Q. B. 572.
(4) Law Rep. 8 Q. B. 313.
(5) 1 Burr. 490, 493.
(6) 4 Camp. 60.
(7) 4 Camp. 349.
(8) Law Rep. 2 H. L. 296.
(9) Law Rep. 7 Q. B. 604.

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principal is foreign; and the ground of this is that the jurisdiction is foreign: Story on Agency § 290. The appellants' defence involves an extension beyond any existing authority. Since *New Zealand &c. Land Co.* v. *Watson* (1) the Court of Appeal (including Lindley L.J.) decided (June 4) *Kaltenbach* v. *Lewis* (2). There was privity of contract between the plaintiffs and defendants: *De Bussche* v. *Alt* (3), citing Story on Agency §§ 201, 217a. But privity is unnecessary: the plaintiffs' claim is to their own property, in whosoever hands that may be found: *Maanss* v. *Henderson* (4); *Westwood* v. *Bell* (5); *Lanyon* v. *Blanchard* (6); *Pannell* v. *Hurley* (7); *Bodenham* v. *Hoskins* (8); *Ex parte Kingston* (9); *Ex parte Cooke* (10); *Knatchbull* v. *Hallett* (11). The defendants must make out their right to detain. When the policies were effected and came into the defendants' possession they knew that they were effected for the benefit of some persons other than Demestre & Co. who were interested in the cargo. That they did not know this when the slip was made is nothing: the slip is no contract. The jury did not find a usage in fact in favour of the lien claimed; and there is no authority in law for it: see Story on Agency §§ 379, 388; *Man* v. *Shiffner* (12); 2 Duer, Insurance p. 282. There is no right of set-off: *Fish* v. *Kempton* (13); *Semenza* v. *Brinsley* (14).

[LORD BLACKBURN referred to the Factors Acts, 4 Geo. 4 c. 83, and 6 Geo. 4 c. 94 s. 1.]

Davey Q.C. replied.

The House took time for consideration.

July 16. LORD BLACKBURN:—

My Lords, I have come to the conclusion that the order appealed against is right and should be affirmed.

(1) 7 Q. B. D. 374.
(2) W. N. 1883, p. 107.
(3) 8 Ch. D. 286, 300, 311.
(4) 1 East, 335.
(5) 4 Camp. 349.
(6) 2 Camp. 597.
(7) 2 Coll. 241.
(8) 21 L. J. (Ch.) 864.
(9) Law Rep. 6 Ch. 632.
(10) 4 Ch. D. 123.
(11) 13 Ch. D. 696, 709.
(12) 2 East, 523.
(13) 7 C. B. 687, 694.
(14) 18 C. B. (N.S.) 467.

The dispute arises out of the insolvency of Demestre Chia & Co., a firm of merchants carrying on trade at the Havannah. The appellants, Mildred & Co., are merchants, trading in London, and were correspondents of Demestre Chia, who, at the time they stopped payment, on the 18th of September, 1880, were largely indebted on the balance of the account between them to Mildred & Co. On the 28th of July, 1880, Mildred & Co. received from Demestre Chia a telegram in the following terms: "Insure all risks, £8000, cargo tobacco, Spanish schooner Bachi, first veritas, destination, Gibraltar; consigned to you."

Their answer by letter was: "In accordance with your instructions we have opened a provisional policy for said amount at the premium of 60*s.* per cent. sailing on the 1st of August, 80*s.* per cent. 20th of August, £6 6*s.* after the last date. To pay particular average if it amounts to 5 per cent. on each series of ten bales running numbers on landing. On receipt of shipping documents, we will have the policy duly extended." On the 3rd of August they received a further telegram, dated the 31st of July: "Bachi despatched to-day, will sail to morrow, insure £3000 more." And they accordingly increased the provisional insurance to £11,000.

No explanation was given at the trial as to what a provisional policy was, and I do not recollect ever to have met with the phrase before; but this much is plain, that all the terms of the policy were agreed on, but that Mildred & Co. were not to make themselves liable to the underwriters for the premiums until they had in their possession the shipping documents, so as to have something on which they had a hold; and that they did make themselves liable for the premiums as soon as, and not till, they had got those shipping documents.

On the 9th of August they received a letter from Demestre Chia, inclosing the charterparty of the Bachi. I shall have to read that letter afterwards. I need at present only say that the charterparty was in the name of Demestre Chia. On the 17th of August, they received a letter dated the 31st of July, which I shall also have to read. It is enough at present to say that it inclosed the bills of lading and invoice of the cargo of tobacco per Bachi, and that both of those were in the name of Demestre

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Chia, and that the letter repeated the telegram, stating that, "the Bachi was despatched to-day, Saturday; will sail to-morrow."

Mildred & Co., now having the shipping documents, proceeded to have the policies, to use their own phrase, extended. The first was a policy with the Royal Exchange Assurance Company, in the ordinary form of the policies of that company: "Mildred, Goyeneche & Co., as well in their own name as for and in the name and names of every other person or persons to whom the same doth, may or shall appertain in part or in all, doth make assurance and causeth themselves and them and every of them to be assured, lost or not lost, at and from Havannah to Gibraltar," on tobacco valued at £11,000, per Bachi. The policy then proceeded, in the usual form of such policies, to specify that the premium was to be 3 per cent. on £3,500, part of the £11,000, and the seal of the company was affixed on the 18th of August, 1880.

Mildred & Co. seem to have shewn the telegram of the 31st of July, and from it it was naturally but erroneously thought that the Bachi sailed on the 1st of August and that the premium therefore was to be 3 per cent. It was discovered afterwards that she did not sail till the 4th of August, and, therefore, that the premium ought, according to the terms provisionally agreed upon, to have been 4 per cent. This error was corrected by an indorsement, under the seal of the company, bearing date the 29th of September, 1880. But the policy itself bore date the 18th of August. Two other policies, one in the Universal Marine, for £3,500, and another in the Marine Insurance, for £4000, were executed on the same 18th of August. They were in the forms adopted by those companies, and therefore differed slightly in form, but in substance were precisely the same as that with the Royal Exchange Assurance Company. Each was "lost or not lost," each was for a premium of 3 per cent., and on each was a memorandum rectifying this mistake.

The position of Mildred & Co. was that they held the charter-party, invoice, and bills of lading of the tobacco by the Bachi, all made out in the name of Demestre Chia. They also held three policies on this tobacco to the aggregate amount of £11,000, insured in their own names, lost or not lost, and for the

premiums on which they had pledged their credit to the companies. That being so, the Bachi was lost on the 13th of August, and news of this event arrived in London on the 23rd of August. Mildred & Co. proceeded to make claims on the insurance companies. They were adjusted as a total loss, and on the 8th of October the companies paid to Mildred & Co £10,881 13*s.* 11*d.* It is not explained, and is not now material, why they did not pay £11,000.

In the meantime Demestre Chia stopped payment on the 18th of September, the balance of the account between Demestre Chia and Mildred & Co. being heavily in favour of Mildred & Co. The respondents, Maspons & Brother, who were a firm trading at Havannah, gave notice to Mildred & Co. that the Maspons were owners of the cargo by the Bachi and claimed the insurance money. The precise date is not, I think, given, but it was admitted at the trial that it was before any portion of the money was received by Mildred & Co.

It was never, I think, disputed by any one that Mildred & Co. had a right to retain so much of the insurance money as would repay them the premiums, stamps, and commission in respect of this transaction of insurance; but Mildred & Co. claimed a right to retain the whole money until they were repaid all for which they could establish a lien against Demestre Chia. This was denied by Maspons, and the action was brought to try that question.

I pass by at present all questions about the form of the pleadings, and about privity of contract and agency, on which a good deal of argument has been employed both in the Court below and at your Lordships' bar. I will say a few words on those points afterwards. For the present I address myself exclusively to the question on the merits, which not only is of importance to the parties as involving a large sum of money, but is of great public importance as affecting the very extensive business carried on by merchants dealing with foreign correspondents, who are intrusted, on commission, by others with goods for consignment or sale, and ship them in their own names. I think, however, when the documents proved, and the answers of the jury to the questions

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asked them at the trial are considered, this question on the merits, though very important, is not of much difficulty.

Maspons & Brother were a firm trading at Havannah. They had had previous dealings with Demestre Chia, intrusting them with goods for consignment, on which Demestre Chia sometimes made them advances. Demestre Chia had shipped those goods in their own name to their own correspondents, who conducted the transactions abroad according to the orders they had received from Demestre Chia. The returns always were consigned to Demestre Chia, who accounted for them to Maspons & Co., and for all this Demestre Chia charged Maspons & Co. a commission. This is a common course of business. One great object in conducting business thus is, that as the returns pass through the commission merchant's hands he has a security for any advance he may have made; and the intrusting party often if not always gets an advance which he would not otherwise obtain. Maspons not only knew that Demestre Chia had correspondents in London but they knew the name of those correspondents to be Mildred & Co. and that they were a house in good repute. They never, however, had any communication with them direct until they made the claim on the policies, and Mildred & Co. did not till then know the name of Maspons at all.

Maspons had intrusted Demestre Chia with a small quantity of tobacco for sale in Gibraltar, by way of trying the market, which Demestre Chia had shipped in their own names; and Maspons were contemplating a greater adventure if that small sample fetched a good price. I mention this as explanatory of the letters which I shall presently read, on which, in my mind, the question depends.

Maspons & Brother having made up their minds to enter on this greater adventure purchased the tobacco which was afterwards shipped by the Bachi. They applied, partly by word of mouth and partly in writing, to Demestre Chia to conduct this consignment for them on commission. They evidently expected that Demestre Chia would, besides making the necessary shipping disbursements, which they did, make them a large advance, but, probably owing to their stoppage, no such advance was in fact

made. They negotiated for arrangements that the tobacco should be sold under the superintendence of Mildred & Co., whom they knew to be Demestre's English correspondents, and that the proceeds should be transmitted by Mildred & Co. to Demestre Chia, but, the tobacco having perished at sea, those arrangements never came into operation.

Maspons (it is not now material to inquire what influenced them to do so) having arranged with the captain of the Bachi the terms of the charter, caused it to be made out by him, with Demestre Chia and in their name. The invoice was also made out in Demestre Chia's name as shipped by them to Mildred, Goyeneche & Co., London, for account and risk of whom it might concern. The bills of lading also were made out in the name of Demestre Chia deliverable to their order. Maspons at first requested Demestre Chia to insure the goods with the Lloyd Habanero, but changed their minds and requested them to have them insured in London, which was accordingly done, as I mentioned before. And then the two letters were put in evidence, that of the 24th of July, which inclosed the charterparty, and that of the 31st of July, which inclosed the invoice and bills of lading. Of those I will now read the part bearing on this transaction, from the translation from the Spanish:—"Although we have not received advice from you with regard to the bales of tobacco which we shipped to you by way of trial, in view of the news of the rise of tobacco in the German markets, the 'interesado' has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig Bachi, Captain Uribe, for Gibraltar and Marseilles, on the conditions stated in the inclosed charterparty. The cargo will consist of 1500 tierces leaf tobacco, and about 550 quintals picadura (cigarette tobacco), which we are going to ship to your consignment with bill of lading to order, that you may order the reshipment in Gibraltar of the whole or a part to whatever destination you may judge most convenient. You will also consign the ship, forwarding to your correspondents in Gibraltar the charterparty. The cargo, in order to please the 'interesado,' we will insure here with the 'Lloyd Habanero.' It may be found convenient to keep some tierces of tobacco and picadura in Gibraltar, and ship

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by the same vessel 250 quintals picadura for Marseilles. In that case you will give your orders accordingly, and have the remaining tierces reshipped. We will forward you in due course the invoice and bill of lading, and we propose dispatching the vessel in about eight days. Messrs. Mildred, Goyeneche & Co. London."

"Havana, 31st July 1880.—We confirm our letter of the 24th instant, of which we inclose duplicate, with that of the invoice of drafts of the B/L of spars per Eduardo and charter per Bachi. . . . We are dispatching the Bachi, which sails to-morrow for its destination, and we inclose bill of lading and invoice of its cargo, comprising: M. G. C. 1/1500 tierces leaf tobacco, 1/156 barrels ground picadura, 1/154 bags tobacco, 1/50 boxes pressed picadura, which you will please sell for the best, as if it were your own affair, in accordance with our letter of the 24th instant. The invoice amounts to $50,854. 61 gold, and against this shipment we propose to value upon you for the present £3000 to £4000 at sixty days sight. We mentioned to you in our last that, to oblige the 'interesado,' we would effect here with the 'Lloyd Habanero' the insurance on said shipment, but having convinced him of the convenience of effecting it with you, we requested you on the 27th inst. per cable to do so as follows:—'Insure all risk, £8000, cargo tobacco, Spanish brig Bachi, first veritas; destination Gibraltar, your consignment; which we confirm, and, having cost more than we thought, we are going to cable you again: Bachi, despatched to-day, Saturday, will sail to-morrow; insure £3000 more.' We are &c. (Signed) Demestre Chia & Co."

Manisty J. who tried the cause, left to the jury nine questions. I do not quite make out why the ninth question was asked. The special jury answered them, and I do not see how on the evidence they could have answered them in any other way than they did. The questions and answers were as follows:—1. Were the goods which constituted the cargo in question the property of the plaintiffs?—Yes. 2. Were the defendants employed by the plaintiffs to sell the goods in question for them and to account to them for the proceeds, and did the defendants accept that employment?—Not employed directly for plaintiffs, and defendants

did not accept such employment. 3. Or were the defendants employed by Demestre & Co. to sell the goods and account to them for the proceeds, and did they accept that employment?—Yes. 4. Did the defendants know or have reason to believe that Demestre & Co. were acting as agents for some other person or persons not named?—Yes; they knew or had reason to believe it. 5. Were the defendants employed by the plaintiffs to receive the amount of the insurances for them, and to account to them for the same, and did they accept that employment?—No. 6. Did the defendants receive the amount of the insurances as agents for and on account of the plaintiffs, or as agents for and on account of Demestre & Co.?—They received it for and on account of Demestre & Co. and the individual interested. 7. Did the plaintiffs authorize Demestre & Co. to ship and consign the goods to the defendants in their own names, and were they so shipped and consigned?—Yes. 8. On whose behalf and for whose benefit were the insurances effected?—For all parties whom it might concern. 9. Is there a usual ordinary and well known course of business between foreign consignors and merchants in London, for the latter to make advances to the former against goods and usual shipping documents on the terms that the London merchants are to be entitled to hold the proceeds of all the goods so consigned, or, if they are lost by the perils of the seas, the insurance money against any balance that may be due to them on their general account current with the consignors?—There is not sufficient evidence to enable the jury to decide.

Manisty J. seems to have felt that he was not able to do justice in the case without taking an account between Maspons and Demestre Chia or their representatives, and not seeing how to do this, he entered judgment for the defendants. That difficulty was got over in the Court of Appeal, which, by the order now appealed against, directs such an account to be taken. If their order was in other respects right, it is not appealed against because of their ordering that account to be taken, which indeed seems to have been done at the instance of the defendants now appellants.

It is somewhat singular that neither the learned judges below nor the very able counsel who argued below and at your

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Lordships' bar, seem to have remembered that for the last sixty years the subject with which we are now dealing has been regulated by statute (1). Yet it is so. The first of what are commonly called the Factors Acts, 4 Geo. 4, c. 83 (which received the royal assent on the 18th of July 1823), dealt entirely with the subject of consignees. It was re-enacted, with some slight alterations, in the 1st section of the 6 Geo. 4 c. 94 (royal assent 5th July 1825) of which I will read so much as bears on the present case, "From and after the passing of this Act (5th July 1825) any person or persons intrusted for the purpose of consignment or of sale with any goods, and who shall have shipped them in his own name, shall be deemed and taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money, &c., advanced by such consignee to or for the use of the person in whose name such goods shall be shipped, or on any money, &c., received by him to the use of such consignee, in the like manner, to all intents and purposes, as if such persons were the true owners of such goods; provided such consignee shall not have *notice by the bill of lading or otherwise*, at or before the time of such advance of money, &c., or of such receipt of money, &c., in respect of which such lien is claimed, that such person so shipping in his own name is not the actual and bonâ fide owner of such goods."

That enactment has never been altered, and its provisions have, in practice, been found to work so harmoniously with the practice of merchants that I am not aware that any case has ever arisen requiring a court of law to construe it, which probably is the reason why an Act of such importance is not familiar to every one; but so it is, that it was only almost at the end of the argument at your Lordships' bar that a member of this House recollected this Act, and asked if it did not affect the question. Lord Tenterden's

(1) The reporter is informed that the Factors Acts (including 5 & 6 Vict. c. 39) had been well considered, and (though not so reported) were in the argument before the Court of Appeal referred to, by the learned counsel on both sides. They were not referred to in this House by the appellants' counsel who argued the case because in their opinion those Acts (if relevant) did not assist the appellants. They were not referred to in this House by the respondents' counsel because it was not thought necessary to refer to statutes so familiar and which were not relied on by the appellants, whose claim was based on grounds entirely outside the provisions of the Factors Acts.

abstract of these two Acts is quoted in *Cole* v. *North Western Bank* (1). This statute renders it unnecessary to consider the decisions previous to that enactment, most of which are cited in the judgment of the Court of Appeal. I may say, however, that I think that the enacting part merely confirms what had been previously decided, and what the Court of Appeal have (without having their attention called to the statute) again decided to be the law. The proviso may, however, have the effect of extending the rights of consignees. For I take it that the common law was, that knowledge, however obtained, that the goods were not the property of the person dealing as a principal, prevented the advancer from having a lien for the advances made after such knowledge, on the ground that it was unjust, with knowledge, to take one man's goods to pay another's debt.

Those who promoted the Factors Acts thought that this principle ought to be modified for the convenience of commerce.

It is said (Paley on Agency by Lloyd 226), and though I do not know how it was, it is probable, that in the Bill which afterwards became the 4 Geo. 4 c. 83, as it was introduced, the proviso was that the consignee should not have notice by *the bill of lading*, and that Lord Eldon in Committee added the important words *or otherwise*. Still it is *notice* and not merely knowledge; and notice and knowledge are not necessarily the same. The fourth question was not framed with this distinction in view.

I should be unwilling without more consideration to decide either way, whether knowledge, however acquired, did or did not deprive the consignee of his rights of lien for advances made subsequent to the acquiring of that knowledge, and it is unnecessary to decide that question now, for notice undoubtedly does so deprive him. In the present case the knowledge was conveyed by the two letters I have read, inclosing the one the charter-party and the other the invoice and the bills of lading. And I think knowledge conveyed by the consignor to the consignee in such letters is *notice*.

It is not necessary that there should be notice of the name of the person who has an interest, but only that there is a person having such an interest, or, as in the Spanish letter he is called, an interesado; that is enough to give the consignee notice that

(1) Law Rep. 10 C. P. 360.

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the consignor "is not the actual and bonâ fide owner of such goods," or rather of the whole interest in such goods. But so far as the consignor has an interest by way of lien or otherwise paramount to that of the interesado he is the actual owner, and the consignee has his lien. The order appealed against is therefore, I think, right as far as the merits go.

I will now proceed to make a few remarks on what I may call the technical points. The plaintiffs in their statement of claim say: "The plaintiffs claim 1, £11,000, with interest until payment; 2, a declaration that the said sum of £11,000 is the money of the plaintiffs as against the defendants; 3, such further and other relief as the nature of the case may require."

This seems to me to be exactly what would have been more briefly stated on the old system of pleading under a count for "money had and received to the use of the plaintiffs." The first eighteen paragraphs of the statement of defence amount to saying that the money was not had and received to the use of the plaintiffs, but to the use of the defendants and other persons who had a lien paramount to the plaintiffs. That would, under the old system of pleading, have amounted to the general issue; and under it the defendants could have had the whole question decided on what I have called the merits. It was, I think at your Lordships' bar, contended that the plaintiffs could not have maintained money had and received, even if there had been no lien at all, as suppose that the balance between the plaintiffs and Demestre Chia had been in favour of the plaintiffs, and the balance as between the defendants and Demestre Chia had been in favour of Demestre Chia, still it was said that money had and received would not have lain, for the defendants received the money to the use of Demestre Chia exclusively. Had their relation to them been that of servant to master, as in *Stephens* v. *Badcock* (1), that would have been so. I am not able to understand how that could be maintained after the answers of the jury to the sixth and eighth questions.

By the 19th and 20th paragraphs of the defence it is alleged: "19. The city of Havannah where the plaintiffs are carrying on business is in the island of Cuba, a colony of Spain, and governed by the law of Spain, and the Plaintiffs and their factors and

(1) 3 B. & Ad. 354.

agents the said Demestre Chia & Co. who also carry on business in Havannah aforesaid, conducted all the business relating to the shipment of the said cargo of tobacco to the defendants in Havannah aforesaid, and subject to the said law of Spain. 20. By the law of Spain, whenever an agent deals in his own name with the business intrusted to him by his principal, a third person with whom such agent contracts *is bound to consider the agent as the principal entitled to deal with the subject-matter of the contract as his own property*, and the principal of such agent has no right of action against the third person, unless the principal obtains an assignment from the agent, and the third person so contracting with the agent as aforesaid has no right of action against the principal. It was under this law of Spain that the defendants, who have had long experience in commerce with Spain and her colonies, accepted the consignment of the said cargo."

No evidence whatever was given of that part of the allegation as to the law of Spain which I have marked in italics and read with emphasis. The portions of the Spanish code cited seem to me to go far to shew that the law of Spain does differ from the law of England to some extent. Article 119 of the Spanish code (1) seems to shew that the law of Spain does not establish privity of contract between a principal and those with whom his agent has made a contract to the same extent as the law of England. But the plaintiffs' case in no respect depended on the existence of any privity of contract between the plaintiffs, as principals of Demestre Chia, and the defendants. They had a right, so long as the goods remained in specie, a right consequent on their property, to demand and take their goods from Mildred & Co. on satisfying whatever lien paramount to their right there was on the goods: this depended not on agency, nor on privity of contract, but upon property. And the defendants having effected the insurance for the benefit of all whom it concerned, they had the same right to demand the insurance money that they would have had to demand the goods. They must satisfy every lien on the policy paramount to their own, but after doing so are entitled to the surplus.

It was contemplated by Maspons and Demestre that the tobacco

(1) Set out in 9 Q. B. D. 535.

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was to be sold, and the proceeds were to be remitted. Had this been done questions might have arisen for the solution of which it might have been necessary to consider whether there was privity of contract and to discuss the doctrines laid down in the cases cited in the judgment of the Court of Appeal. Should any such questions arise in some other case, the reasoning in the judgment will be well worthy of consideration. But the goods perished at sea, when the only thing done had been to effect the insurance. With great respect to Lindley L.J. I will not follow him in discussing questions which do not arise. I think therefore that the order appealed against should be affirmed, and the appeal dismissed with costs.

EARL OF SELBORNE L.C. :—

My Lords, I agree with the conclusion of my noble and learned friend.

The fact that the appellants had notice of the respondents' interest, before they had done anything for valuable consideration on the footing and faith of the property in this insurance belonging to Demestre Chia & Co. so that their general lien against that firm could attach upon it, is enough, in my opinion, to decide this case.

There is one observation of my noble and learned friend as to a possible distinction between "notice" and "knowledge," as to which I should desire to reserve the expression of any opinion on my own part, until some case arises in which the question whether actual knowledge, however acquired, is or is not notice, may become material.

LORD FITZGERALD :—

My Lords, the very elaborate judgment which has just been delivered by my noble and learned friend (Lord Blackburn) exhibits another instance of the great care which he gives to all cases coming before your Lordships' House, but especially where any important question of mercantile law is involved.

I concur in the conclusion at which he has arrived.

There were but two questions in the cause when the facts came to be properly understood, though some others were very elaborately discussed both in the Court of Appeal and here. The

first question was as to whether the plaintiffs could in their own names maintain any action against the defendants; for the present I pass that question by.

The second question was as to the extent of the defendants' lien, which went to the whole merits of the action. That the defendants had a lien for their outlay and commission in respect of the policies of insurance was not disputed. Lindley L.J. in delivering the judgment of the Court of Appeal says with accuracy that this question of lien must be determined by English law and depends on a question of fact, viz. whether the defendants knew before their alleged lien accrued that Demestre & Co. were acting for a principal, whose name was not disclosed. I think this is correct, whether the rights of the parties are to be determined by the Factors Act, or by analogy to it, or at Common Law.

On this question of fact there is no opening for any doubt. The lien, if any, of the defendants never attached, speaking accurately, on the cargo of the Bachi, for they never had possession or the right to the possession of the cargo or made any advances on it. Both ship and cargo had perished before the bill of lading and other shipping documents reached the defendants and before any insurance had been effected. Assuming that the policies represented the cargo, they were not effected until the 18th of August 1880, and before that day the defendants had received Demestre Chia & Co.'s letter of the 24th of July 1880 in which occur the passages: "the 'interesado' has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig Bachi," and "The cargo in order to please the interesado we will insure here with the 'Lloyd Habanero.'" We have thus a clear intimation to the defendants that there was a party interested, and such party is described as *the interesado* making the shipment, and at whose desire it had been intended to effect the insurances with the "Lloyd Habanero." The notice to the defendants is in effect that there is a third party who apparently had the whole interest in and control over the cargo.

The Factors Act s. 1, deals with the apparent ownership of goods and provides that for certain purposes and under certain

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circumstances the apparent owner shall be deemed to be the true owner so as to entitle his consignee to a lien for advances, but notice to the consignee deprives him of the statutable protection. It may be open to argument and consideration whether that enactment directly embraces or is applicable otherwise than by analogy to the case before us, but it being quite clear that the defendants had notice that Demestre & Co. were not the actual and bonâ fide owners of the cargo the defendants can have no benefit from the statute, and if they claim their alleged lien on the proceeds of the policy at common law the notice equally excludes that lien.

On the question as to whether the plaintiffs had a right to intervene and in their own names sue the defendants for the money received on foot of the policies of insurance, I think there never was an opening for doubt. The defendants having notice of "the interesado" effect the policies "as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth may or shall appertain in part or in all, doth make assurance and causeth themselves and them and every of them to be assured." Prior to the effecting of these insurances they had received the invoice of the goods headed thus: "Invoice of the following goods shipped by us on board the Spanish brigantine Bachi, Captain Uribe, for Gibraltar *and consigned to Messrs. Mildred, Goyeneche & Co. London, for account and risk of whom it might concern.*" Before the receipt of any part of the insurance moneys the defendants had notice that the plaintiffs were the interesado, and if the plaintiffs are entitled to recover any part of the proceeds, as your Lordships hold that they are, then the money so received by the defendants is money had and received by the defendants for the use of the plaintiffs and which in justice and good conscience they ought to pay over, and an action lies at the suit of the plaintiffs to recover it.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 16th July 1883.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondents: *Waltons, Bubb & Walton.*

[HOUSE OF LORDS.]

THE MERSEY DOCKS AND HARBOUR BOARD . . . . . } APPELLANTS;

AND

JOSEPH GOLDSMITH LUCAS (SURVEYOR OF TAXES) . . . . . } RESPONDENT.

H. L. (E.) 1883 June 28.

Income Tax—Profits of Corporation appropriated by Statute to certain purposes —5 & 6 Vict. c. 35 s. 60, Sch. A. No. III.

A corporation was constituted for the management of the Mersey Dock estate by an Act which provided that the moneys to be received by them from their dock dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; and that after such extinguishment the rates should be reduced; and that except as aforesaid the moneys should not be applied for any other purpose whatsoever; and that nothing should affect their liability to parochial or local rates:—

Held, affirming the decision of the Court of Appeal, that under the Income Tax Acts the corporation was liable to income tax in respect of the surplus though applicable to the above-named purposes only.

APPEAL from an order of the Court of Appeal.

In pursuance of 37 & 38 Vict. c. 16 s. 9 a case was stated at the request of the appellants for the opinion of the Exchequer Division by two of the Commissioners for the general purposes of the Income Tax Acts at a meeting of the Commissioners held at Liverpool. The following are the material parts of the case:—

1. The appellants are the Mersey Docks and Harbour Board, or Corporation, constituted by Act of Parliament for the management of the Mersey Dock estate. There are twenty-eight members of the board four of whom are appointed by the Mersey Conservancy Commissioners and the remainder are elected by the dock ratepayers.

2. The estate of the appellants consists of property at Liverpool and Birkenhead, and comprises wet docks, graving docks, warehouses, quays, sheds, houses occupied by dock masters and other

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servants of the board, lands acquired under the authority of Parliament for dock purposes, workshops, cranes, machinery, railways, and buildings used for and known as the dock offices.

3. The estate is vested in the appellants by virtue of the Mersey Docks and Harbour Act 1857. There are no shareholders nor are any persons individually interested in or entitled to share the surplus (if any) that may arise from the working of the estate.

4. A large part of the estate has been acquired and constructed by means of money borrowed from time to time in that behalf on the security of the rates hereinafter mentioned under statutory powers. These loans are represented by bonds of the board bearing interest. The amount of the debt is about £14,000,000.

5. The revenue of the appellants is derived from the undermentioned sources, the assessment, collection and application of the same being directed and controlled by Act of Parliament:—

1. Dock tonnage rate on ships entering into or leaving the docks. 2. Dock dues on goods imported into or exported from the port of Liverpool and brought into the docks or landed at or deposited upon or carried over any of the appellants' quays, piers, landing stages or land. 3. Town dues on goods imported into or exported from the port of Liverpool. 4. Anchorage dues on vessels anchoring in the Mersey. 5. Harbour rates paid by vessels entering or leaving the Mersey but not using the appellants' docks. 6. Charges for unloading and housing in and delivering from the appellants' warehouses goods from vessels. 7. Quay rents levied in respect of goods not removed by the owners from the quay within the prescribed time and rents for quay space occupied by owners of goods by permission of the board. 8. Rental of various properties belonging to the board and occupied for the storage of timber as shipbuilding yards, stores, coalyards, &c. 9. Payments made by shipowners for the special appropriation to their use of quay space. 10. Charges made for the use of cranes and machinery and tolls levied for the use of the appellants' dock railways.

6. Subject to certain provisions of the Mersey Docks and Harbour Act 1857 which are not material for the purposes of this case, and subject also to certain special directions hereinafter

mentioned, the application of the revenue of the appellants is governed by the 284th section of the Mersey Dock Acts Consolidation Act 1858. In that Act (sect. 3) the word "rates" is defined as including "dock rates, tonnage rates, graving dock rates, harbour rates, wharf rates, warehouse rents, town dues, anchorage dues, and other rates and dues or payments in the nature thereof payable to the board."

By the 284th section it is provided as follows:—"All the moneys which shall be collected, levied, borrowed and raised or received by the board under or by virtue of this Act or the said Act, the application of which may not be otherwise expressly directed, shall be applied by the board in any order with respect to priority of such application as they shall deem expedient for the following purposes, some or all of them, that is to say:—

"In payment of all expenses and charges of collecting rates.

"In payment from time to time of all interest accruing due on moneys borrowed and to be borrowed and in payment of the Mersey Docks' Annuities hereinafter authorized to be granted according to the respective priorities of such moneys and annuities under this Act.

"In the construction of works authorized to be erected, established and maintained by the board, and in supporting, maintaining and repairing the same, and in carrying into execution all the provisions of this Act and of the Mersey Docks and Harbour Act 1857.

"And in the general management, conducting, securing, preserving, improving, amending, maintaining and protecting the Mersey Dock estate.

"And the residue or surplus of all such moneys which shall remain after such application thereof as aforesaid shall from time to time be applied in or towards the repayment of all principal moneys which shall have been borrowed by or shall be due by the board, and in or towards the purchasing up and extinguishing of the Mersey Dock Annuities in the manner hereinafter directed, until all such principal moneys shall have been repaid and all Mersey Dock Annuities shall have been purchased up and extinguished, and when by the means last mentioned all such principal moneys shall have been repaid and all such dock

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annuities shall have been purchased up and extinguished, then and in such case the board shall and they are hereby required to lower and reduce the rates hereby authorized to be taken so far as the same can be done in the then state of the docks and leaving sufficient for the payment of the expenses of collecting the rates and the supporting, maintaining, and repairing the docks, and the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock estate.

"And except as aforesaid such moneys shall not be applied by the board for any other purpose whatsoever."

7. By the 285th section of the same Act it is provided as follows:—"Nothing in this Act contained shall alter or affect the question of the liability of any of the docks or works vested in the board to parochial or local rates, but the same shall in all respects be judged of and determined as if this Act had not been passed."

8. The special directions as to the application of the revenue of the estate, so far as they are material to this case, relate to the application of moneys to a sinking fund for the repayment of the principal moneys of the debt and are contained in the 4th section of the Mersey Docks (Money) Act 1859, which is as follows:—"In order to make provision for the repayment of the principal moneys which have already been borrowed or which may hereafter be borrowed by the board under the authority of Parliament, be it enacted that after payment in each year of all charges and expenses attending the collection of rates or incidental thereto or to the recovery thereof, and after payment of all interest accruing due on moneys for the time being forming a charge upon such rates and of the dock annuities authorized to be granted by the board, and after payment of all charges and expenses of supporting, maintaining, and repairing the works authorized to be erected, established, and maintained by the board and of the general management of the Mersey Dock estate and of all reasonable expenses necessary for conducting, securing, preserving, improving, amending, maintaining, and protecting the same, the board shall yearly and every year subsequent to the 24th day of June 1860 apply the surplus if any of the rates which shall remain in their hands after such payments as aforesaid to the

extent of £100,000, or such less amount as the said surplus shall be equal to, in or towards the repayment of some or any of the principal moneys which shall then be due and owing on the security of the rates, and which shall then have become due and payable, and in the purchasing up and extinguishing of the Mersey Dock Annuities which may be then existing, according to the respective priorities of such moneys and annuities, until all principal moneys due on the security of the rates shall have been repaid and all Mersey Dock Annuities shall have been purchased up and extinguished, and subject to the provisions herein contained all rates and other moneys which shall be collected, levied, borrowed, and raised or received under or by virtue of the said recited Acts or either of them or of this Act, the application of which may not be otherwise expressly directed, shall and may be applied by the board according to the provisions for that purpose contained in sect. 284 of the Mersey Dock Acts Consolidation Act 1858."

The word "rates" in the above section has the same meaning as is assigned to it by the Mersey Dock Acts Consolidation Act 1858.

9. The appellants (as directed by the before-mentioned Act of 1857) make up year by year an account shewing their total receipts and expenditure and the appropriation of the surplus (if any) of the former over the latter. If, after payment of interest on the debt, and providing for the prescribed sum to be placed to the sinking fund account there remains any balance to the credit of the general account, the amount is carried forward to the next year's account and employed for the general purposes of the trust and in meeting accruing liabilities.

10. In the annual account which was made up to the 1st of July 1872 the total amount of the net receipts of the appellants was £697,964, and out of that sum, after providing for the payment of interest on the debt, the sum of £100,000 was placed to the sinking fund account, and a surplus was carried forward to the next year's account.

11. By 36 & 37 Vict. c. 18, income tax at the rate of threepence in the pound was imposed for the year commencing the 6th of April 1873 in respect of all property, profits, and gains mentioned or described as chargeable under Schedules (A) (C)

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(D) or (E) of 16 & 17 Vict. c. 34, and all such provisions contained in any Act relating to income tax as were in force on the 5th of April 1873, were made applicable to the income tax so imposed.

The provisions of the Acts relating to income tax which have the most material bearing upon the question, are No. III. of Schedule (A) in sect. 60 of 5 & 6 Vict. c. 35, sect. 102 of the same Act, and sect. 8 of 29 & 30 Vict. c. 36.

No. III. of Schedule (A) contains the provisions following:—

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited.

"1. . . . . .

"2. . . . . .

"3. Of ironworks, gasworks, salt-springs or works, alum-mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways, and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments or heritages, on the profits of the year preceding.

"The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, corporations, companies, and societies respectively shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern."

Sect. 102 of 5 & 6 Vict. c. 35 is as follows:—"And be it

enacted that upon all annuities, yearly interest of money or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of sevenpence without deduction, according to and under and subject to the provisions by which the duty in the third case of Schedule (D) may be charged. Provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorized to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable. But in every case where any annual payment as aforesaid shall, by reason of the same being charged on any property or security in Ireland or in the British plantations, or in any other of Her Majesty's dominions, or on any foreign property or foreign security or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money

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shall not be reserved, or charged, or payable for the period of one year, then and in every such case there shall be charged upon such interest, annuity, or other annual payment as aforesaid, the duty before mentioned according to and under and subject to the several and respective provisions, by which the duty in the third case of Schedule (D) may be charged. Provided always that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having the management of the accounts with the duty payable on such interest, and every such officer shall be answerable for doing all acts, matters, and things necessary to a due assessment of the said duties and payment thereof, as if such rates or assessments were profits chargeable under this Act, and such officer shall be in like manner indemnified for all such acts, as if the said rates and assessments were chargeable."

Sect. 8 of 29 & 30 Vict. c. 36 is as follows:—"The several and respective concerns described in No. III. of Schedule (A) of the said Act passed in the 5th and 6th years of Her Majesty's reign, chap. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned according to the rules prescribed by Schedule (D) of the said Act, so far as such rules are consistent with the said No. III.; provided that the annual value or profits and gains arising from any railway shall be charged and assessed by the Commissioners for special purposes."

12. In making a return for assessment of income tax by the Commissioners acting under Schedule (D) for the year 1873–4, the liability of the appellants was stated at the amount due and payable by them for interest on the debt during the year of assessment, being the sum of £532,252.

13. The surveyor of taxes, the respondent, was dissatisfied with the amount so stated in the return, and duly served a notice of surcharge upon the appellants. By such surcharge the sum of £532,252 was increased to £697,964 as the profits for the year preceding of the concern under the management of the appellants.

14. Notice of appeal against this surcharge was given by the

appellants, and the appeal came on for hearing before the Commissioners in March 1875.

15. Upon the hearing of the appeal it was contended on behalf of the appellants that their liability to income tax (if any) did not extend beyond the sum which was paid as interest upon the debt, and ought not to extend to the said sum of £100,000 carried from the revenue to the sinking fund account, or to the surplus carried forward to the next year's account. On the other hand, it was contended on behalf of the respondent that under the provisions of the Income Tax Acts the appellants were liable to assessment to income tax in respect of the profits arising or accruing to them from the concern under their management, and not in respect of interest due or payable by them, and that for the purpose of ascertaining the amount for such assessment the total amount of their receipts should be taken, from which there should be deducted the cost of working, maintaining, and repairing the sources of revenue, but not the interest payable upon the debt nor the said sum of £100,000.

16. The Commissioners concurred in the view put forward on behalf of the respondent, and having satisfied themselves that allowance had been made in respect of rents for warehouses &c., already charged under No. 1 of Schedule (A), confirmed the surcharge in the sum of £697,964.

17. The appellants expressed their dissatisfaction with the determination of the Commissioners as being erroneous in point of law, on the ground that in the circumstances herein stated no assessment could be made upon them in respect of any larger amount than the interest on their debt, and duly required the Commissioners to state and sign a case.

18. Either party was to be entitled to refer to and rely upon any of the provisions of the several Acts of Parliament relating to the Mersey Dock estate and to income tax, and the Court was to have power to draw inferences of fact.

The question for the opinion of the Court was whether the assessment made upon £697,964 was the proper assessment; or whether it should have been made upon the sum of £532,252 or upon any other and what sum.

The Queen's Bench Division (Grove and Lindley JJ.) were of

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opinion that under the words of s. 284 of the Mersey Act 1858 the appellants were exempted from liability to income tax in respect of the surcharge, and made an order dated the 16th of March 1881 declaring that the assessment should have been upon £532,252, being the amount payable by the appellants for interest on their debt during the year ending the 5th of April 1874.

The Court of Appeal (Jessel M.R. and Brett and Cotton L.JJ.) by an order dated the 7th of December 1881 varied the order of the Queen's Bench Division, and confirmed the assessment of the Commissioners upon the sum of £697,964.

June 26, 28. *Webster* Q.C. and *Bigham* for the appellants:—

The appellants are not taxable, the surplus moneys earned being appropriated to particular purposes by their private Acts, those purposes being essential to the carrying on of the undertaking and to the earning of the moneys. The case is very similar to *Glasgow Corporation Water Commissioners* v. *Solicitor of Inland Revenue* (1). The moment the moneys are made they are appropriated by the same enactment which enables the moneys to be made. Sect. 285 of the appellants' Act 1858 was passed in view of the question raised by the litigation which ended in *Jones* v. *Mersey Docks* (2). The judgment of Jessel M.R. lost sight of the question whether the moneys raised are more than sufficient to pay the outgoings. The object of the Income Tax Acts was to tax "profits or gains" which are applicable at the pleasure of the earner, and not such as are applicable only to the source of income, the thing out of which the profit comes.

Sir *H. James* A.G. Sir *F. Herschell* S.G. and *Dicey* for the respondent, were not heard.

EARL OF SELBORNE L.C.:—

My Lords, the circumstances under which this case comes before your Lordships are these. The question is, whether

(1) 2 Court of Sess. Cas. 4th Series, 708.
(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1, 15.

income tax is chargeable upon a sum which on the one side is alleged to be the annual profit of the Mersey Docks and Harbour Board of Liverpool, and which is denied on the other side to be of that character. The Queen's Bench Division determined that question upon a ground which, I think, was practically abandoned at the Bar as untenable, that ground being, that in a local Act, the Mersey Docks Act of 1858, the appropriation of the receipts of the dock board is directed, and, after enumerating the purposes there mentioned, these words follow: "And except as aforesaid such moneys shall not be applied by the board for any other purpose whatsoever." It appears to have been thought by the two learned judges who took part in the judgment in the Queen's Bench Division that those negative words excluded any application of the moneys to income tax, because among the enumerated purposes to which the proceeds of the concern were to be applied income tax was not mentioned. Neither were poor rates, except that there was a saving clause that nothing in the Act contained should "alter or affect the question of the liability" "to parochial or local rates." I find, however, that in advising this House in *Mersey Docks* v. *Cameron* (1), and *Jones* v. *Mersey Docks* (1), my noble and learned friend (Lord Blackburn) who then delivered the opinion of the judges, which was adopted by the House, in a case in which there was no such special clause, said, "There are no negative words prohibiting the application of the rates to payment of the poor rate; and we think, in conformity with the decision in *Tyne Commissioners* v. *Chirton* (2), that enactments directing that the revenue shall be applied to certain purposes and no others are directory only and mean that, after all charges imposed by law on the revenue have been discharged, the surplus or free revenue which otherwise might have been disposed of at the pleasure of the recipients shall be applied to these purposes."

If it were not superfluous to express concurrence in an opinion which may be taken to have been approved by the House of Lords in 1865, I should express my full concurrence in that opinion; and it has been candidly admitted at your Lordships' Bar that that opinion seems not to have received the attention

(1) 11 H. L. C. 443, 480. (2) 1 E. & E. 516.

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due to it when this case was before the Queen's Bench Division. I will add further, that even independently of the sound general doctrine laid down in the passage which I have read from the opinion of the judges delivered in 1864, it seems to me that the view expressed in the Court of Appeal is perfectly right; and that it would be a very strange thing indeed, and wholly inconsistent with the principles which are well established as to the construction of Acts of Parliament, and I may say more especially of local and personal Acts of this nature, if duties given to the Crown, taxes imposed by the authority of the legislature, by public Acts for public purposes, were held to be taken away by general words of this kind in a local and personal Act, and an Act in which the Crown is nowhere mentioned so as to be bound by it. The addition of an express saving clause as to parochial and local rates cannot, in my opinion, prevent the application to public taxes, of the principles which, upon the enacting words, would otherwise have been applicable.

For this purpose it seems to me to be immaterial whether we regard this question as governed in substance by the Income Tax Acts which were passed before the year 1858, or by the Income Tax Acts, or any of them, which were passed since. If by those passed since, it would be an extravagant proposition indeed to say that a subsequent public Act imposing duties is not to operate because a prior local and personal Act contained negative words of this kind. But if you look to the Act which had been passed before, to my mind the argument is the same. A public Act had imposed duties. There is not a word in this private Act about those duties, nor about taking them away from the Crown, nor could these negative words possibly have that effect. In truth, the income tax stands in the singular position of being in one sense imposed after and in another sense before this Act; after, because the present rate of income tax is governed by the continuance Acts, or by the Acts which have varied the rate from time to time and which are later; but all those Acts refer to the earlier Act and incorporate its provisions; and it is perfectly manifest, as a matter of construction, that what was taxed by the earlier Acts was meant also to be taxed by the later. I think that this was felt at the Bar, and the consequence

has been that the case has been in substance argued before your Lordships upon other grounds.

Then I come to examine those other grounds. I think the more convenient method of proceeding is to look first at the terms of the Acts before one goes at all beyond them. Now the Income Tax Act that we have to construe (5 & 6 Vict. c. 35 s. 60 Sch. A No. III.) expressly imposes the tax upon "the annual value of all the properties hereinafter described," which is to be "understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." Then it goes on to say that this is to be understood as to the yearly profits, amongst other things, of "docks." The tax is to be upon the profits, as I said before, of the year preceding, and it is to be charged amongst others upon every "corporation" "carrying on the concern," and it is to be charged "on the amount of the produce or value thereof." What is "thereof?" Of the concern which the corporation carries on. If we had nothing more than that, I should have thought that we were to consider, not the application of the moneys which the Mersey Board received when they had received them, but the "profits of the concern," in the sense of the produce or value which could properly be described as "profit of the concern," and that surely would be all the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received.

But the Act does not stop there—it goes on to say that this charge is to apply "before paying, rendering or distributing the produce or the value either between the different persons or members of the corporation, company or society engaged in the concern" (those are words which would not apply here, because the proceeds of this undertaking are not so distributable) "or to any creditor or other person whatever having a claim on or out of the said profits." Therefore, so far as these words go, they distinctly exclude from deduction, as regards the question of priority over the tax payable to the Crown, all payments "to any creditor or other person whatever having a claim on or out of the said profits." That proves distinctly, that the word "profits," as here used, does mean the incomings of the concern after deducting

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the expenses of earning and obtaining them, before you come to an application of them even to the payment of creditors of the concern.

With regard to this particular case the whole application, in respect of which it is contended that the character of profits is taken away from the subject-matter, is payment to creditors. The Act does not say "dividends or interest payable to creditors," but it says "before paying, rendering or distributing the produce or the value" "to any creditor or other person whatever having a claim on or out of the said profits." No doubt it goes on to say, that a proportionate deduction of duty is to be allowed by a creditor, that is to say, that the duty which is imposed also upon himself, if paid in this manner by the company and charged upon the company, is to be allowed by him as a deduction in their favour; but that does not take away from the force of the generality of the words which precede it, and which say, that no deduction is to be allowed in respect of the application of the "said profits," in the sense I have mentioned, to any creditor or other person having a claim upon them.

Now I should have thought this quite sufficient to settle the whole matter; because it shews, that in these cases you are to charge the corporation or company upon its entire net receipts for the purpose of duty, and to disregard every application which may have to be made, whether in favour of creditors or others, of any part of those receipts. It is clear that in this case it is not under the later section that the officers of the company pay other men's income tax, but they pay their own, and in paying their own, they cover to a certain extent that of other men, and therefore they are permitted to deduct it.

But I will go further, and say, that it appears to me that the rules in Schedule D, which are introduced and made applicable by the later Act, entirely confirm this view, which is the natural and primâ facie view of the meaning of the words which I have read, as applicable to the earlier schedule. When we come to the later Schedule D, the rules of which are by the later Act applied to this particular class of undertakings, the same reasoning is confirmed. The rules are these: "First case—Duties to be charged in respect of any trade, manufacture, adventure or concern in the

nature of trade not contained in any other schedule of this Act." "First, the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern."

I pause there to observe that although in the Act of Parliament "profits" and "gains" are really equivalent terms, yet the use of the word "gains" in addition to the word "profits" furnishes an additional argument for excluding the contention of the appellants that you are to introduce into the word "profits" some ideas connected, not with the nature of the thing, but with the manner and rule of its application. What are the gains of a trade? If it could be reasonably contended that the word "profits" in these Acts has reference to some advantage which the persons carrying on the concern are to derive from it, it might be said perhaps that the same argument might have been raised upon the word "gains;" but to my mind it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used, whether it is gained for the benefit of a community, or for the benefit of individuals. Whether the benefit is to be obtained by dividends, or whether it is to be obtained by lightening and diminishing public burdens, it is the same.

Then the schedule goes on to say that it allows an average of three years to be taken where the business has been carried on for three years, and then it says that it "shall be assessed, charged and paid without other deduction than is hereinafter allowed." So that the Act specifies what deductions are to be allowed. The first part of the Act has excluded deductions for creditors and persons having claims, and this goes on to allow some particular deductions which are not material here and also to speak of some that are not to be allowed. "Third. In estimating the balance of profits and gains chargeable under Schedule D. or for the purpose of assessing the duty thereon," first, no sum shall be deducted "for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern," then secondly, "nor for any sum expended for the supply of repairs," or "keeping up the plant and stock-in-trade beyond what has been usually expended on the average of three years."

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That at all events goes strongly against the notion that you are to go a-field and inquire into the benefits to be derived by one person or another, and the mode of deriving them, in the manner which the argument at the Bar requires. Then it goes on to say, "Nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure or concern." That is to say, no addition to capital, no improvements (made out of capital at all events) of premises are to be allowed; and although all those particular things are enumerated, yet they are enumerated after a general provision that the tax is to be paid without any other deduction than that which is afterwards allowed. It is therefore quite impossible that according to the principle of the Income Tax Acts these payments to creditors can be taken into consideration.

Then what remains of the argument? Merely this, that a local and personal Act has regulated the application of the gross receipts of the undertaking, and has said that they may be applied to the expenses of collection, to the payment of interest, which it is admitted (at least it must be admitted) is excluded by the Income Tax Act from being taken into account, then to the construction of works which would fall within the principle of some of those deductions which are expressly excluded by Schedule D, and in supporting and maintaining the works and the general management of the estate and all reasonable expenses for maintaining and protecting the same, and then in extinguishing debt; and ultimately the rates are to be reduced. Those applications may be made by the board "in any order with respect to priority of such application as they shall deem expedient;" and it is plain that some of them are expenses which must be incurred in order to earn any gain or profit from the undertaking, and others of them are applications of the gain or profit when earned. The expenses of the general management of the estate, and the expenses and charges of collecting rates, are manifestly antecedent to the earning of any profit. The rest, the

construction of new works, the payment of interest and the repayment of principal, all pre-suppose that the profits have been earned and that there is a clear fund which can be so applied. To my mind it is exactly the same thing as if there had been a declaration that, after paying the current expenses and all other necessary outgoings without which nothing could be earned, the clear surplus profits and gains of the undertaking should be applied in a certain manner—that is the substance of it. The mode of the application makes no difference whatever to the question of what is "profit" and what is "gain."

That appears to me to be the plain and simple view of the case—it is the same view which has been taken by the Court of Appeal, and therefore I move your Lordships that this appeal be dismissed with costs.

LORD BLACKBURN :—

My Lords, I am of the same opinion, and I think that when the manner in which the case is raised and the point in the case itself are understood, it is obvious that that point lies in a very small compass indeed.

The Mersey Docks and Harbour Board, who are the creature of an Act of Parliament, as we are told in paragraph 3 of the joint case, obtain a revenue from a variety of sources. I need not go through them all. The board are proprietors of docks, and in respect of those docks they receive a revenue from exactly the same sources from which any private dock company, say the St. Katharine Dock Company in London, would receive them. They receive a revenue from dock tonnage, from dock dues, from charges for loading and unloading, from quay rents, from payments made by shipowners for the appropriation of quay space to them and from charges made for the use of cranes and machinery. All those, as I say, are exactly the things from which a private dock company would receive its revenue. Besides those, they have three items of revenue, namely, "town dues on goods imported into or exported from the port of Liverpool," "anchorage dues on vessels anchoring in the Mersey," and "harbour rates paid by vessels entering or leaving the Mersey, but not using the appellants' docks." Those items are of a different nature. I

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believe they have been modified and extended by an Act of Parliament, but in their nature they were ancient harbour dues such as any one who refers to Hargrave's Tracts, where there is a great deal about them, will find were enjoyed by a private person in Tynemouth harbour under an ancient grant. It is enough to say of them that they are property arising from petty customs and harbour dues which might belong to a private person, but as the case states in fact do belong to the Mersey Docks and Harbour Board. Besides that the board derive a revenue from the rental of various properties.

Now when we see how the question arose between the parties we find what is the real point in the case. The Mersey Docks and Harbour Board returned their assessment for the income tax as they ought to do, and they stated the amount upon which they considered themselves assessable thus; "the amount due and payable by them for interest on the debt during the year of assessment, being the sum of £532,252." The surveyor of taxes surcharged them, and by such surcharge the sum was increased to the amount of "£697,964, as the profits for the year preceding of the concern under the management of the appellants." On appeal to the Commissioners of Income Tax the contention was "that their liability to income tax (if any) did not extend beyond the sum which was paid as interest upon the debt and ought not to extend to the said sum of £100,000 carried from the revenue to the sinking fund account or to the surplus carried forward to the next year's account. On the other hand it was contended on behalf of the respondent that under the provisions of the Income Tax Acts the appellants were liable to assessment to income tax in respect of the profits arising or accruing to them from the concern under their management and not in respect of interest due or payable by them, and that for the purpose of ascertaining the amount for such assessment the total amount of their receipts should be taken, from which there should be deducted the cost of working, maintaining, and repairing the sources of revenue, but not the interest payable upon the debt nor the said sum of £100,000." The Commissioners concurred in the view put forward on behalf of the respondent, and having satisfied themselves that allowance had been made in respect of rents for warehouses et

cetera" (that is their real property) "already charged under No. 1 of Schedule (A), confirmed the surcharge in the sum of £697,964." So that there never was any real dispute at all that Her Majesty, whether she got it in one way or got it in another, was to have income tax upon the £532,252 which goes in payment of the interest on the debt, but the contest was and is whether under the peculiar local Acts of this Mersey Board there was anything to say that they were not to pay income tax on the residue which, after deducting all the expenses of earning it, and after taking away all that was chargeable under Schedule (A), has in fact been found to be £165,712. The real question in dispute is whether income tax is payable upon that sum.

The first ground upon which the case of the appellants was put was that by the terms of the local and personal Acts of the Mersey Docks and Harbour Board, it was enacted that they were to pay this sum in reducing the debt (I am putting it roughly) and nothing else whatever, and that that meant that they were not to pay income tax upon it. That seems to have been the opinion to which Grove J. and Lindley J. came in the Divisional Court, and they decided upon that ground. Their attention was not called either to the arguments which were used, nor to the authority, in the cases of *Mersey Docks and Harbour Board* v. *Cameron* (1) and *Jones* v. *Mersey Docks and Harbour Board* (1), where, with regard to this very same body, it was decided that their statutes did not amount to an enactment forbidding them to pay poor rate. But as soon as it was made clear to the Court of Appeal that that had been the decision, they said, "That point will not do at all," and there was a further reason which was given, namely, even if it had been said that they were not to pay poor rate, the income tax stood in a much better situation. For all those reasons, in fact, that ground has been substantially abandoned in the argument at your Lordships' Bar; and after what the noble and learned Lord on the woolsack has said, I will say no more about it.

Then comes the second point which was argued, and which was in effect this. After the Mersey Docks and Harbour Board have done all that would have been done by the St. Katharine Docks

(1) 11 H. L. C. 443.

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Company or any other private dock company who own docks in order to receive their income, the Act of Parliament says, you must apply the surplus to reducing it, and when the debt is paid you must diminish your dock rates, and of course when you have paid off your debt your rates will be reduced (if you or your successors do your duty) by the amount of £500,000 odd, and then there will be in future less revenue raised and of course less income upon which to pay income tax. And the argument which is endeavoured to be urged is this, that inasmuch as they are ordered to apply to that purpose the sum which remains after all those expenses have been deducted, therefore the Queen is not to have income tax upon it. With reference to that I have endeavoured in vain to grapple with what the counsel for the appellants were saying, in order to bring it to a definite point. There is no ground whatever for saying it that I can see—there is nothing in the nature of things, there is nothing in the words of the Act, to say that when an income has been actually earned, when an actual profit upon which the tax is put has been earned and received by any person or corporation, Her Majesty's right to be paid the tax out of it, in the least degree depends upon what they are to do with it afterwards, except in certain excepted cases, such as charitable trusts and some others. If the amount thus received is to be applied at their pleasure they must pay the tax. If it is to be paid over to shareholders or to creditors, the Queen is still to have her tax. Although it is expressly said that she is to be paid "before" they pay it over to any such person, it does not mean that she is not to be paid unless they are going to pay it over to any such person. It is impossible to construe it in that way. Whether it is to be applied in one way or the other, the Queen is to have her tax upon it. The question therefore is solely whether or no the sources which produce this revenue are among those things which are enumerated (I care not whether in Schedule A or Schedule D) as those upon which the tax has been granted to her Majesty. It appears, as I have already pointed out, that in this particular case every one of these things is a thing in which a private person might have property, and from which a private person might receive revenue just as the Mersey Board does; and if so, a private

person would certainly be taxable upon it, and I see no reason whatever why the Mersey Board should not be taxable.

I have looked at the case of *Glasgow Corporation Water Commissioners* v. *Solicitor of Inland Revenue* (1). I have not looked at the Acts relating to the Glasgow Waterworks or the Acts under which that particular point was raised, and I have not formed an opinion upon them; but knowing the great care and accuracy of the Lord President, I have no doubt that he construed those Acts rightly in construing them as he did. There the appellants relied very much upon some dicta in *Attorney-General* v. *Black* (2), where the question was this: The corporation of Brighton had become entitled to a considerable income raised from duties on coals imported into Brighton, and that income they were obliged to bestow upon their corporate purposes, and bring into their borough funds. It was held there that they were liable to pay income tax upon that as being an income derived from coal duties. But in the course of the discussion it was said, amongst others, I see by myself, in the Exchequer Chamber, that this was because it was an income, or profit, or revenue within the meaning of the Income Tax Act, and that it did not apply in such cases as that of a poor rate, where the overseers levy a large rate, or of a highway rate, where the surveyors of the highway levy a rate for the purposes of the highway, or in the case of a municipal corporation who levy a borough rate for the purpose of spending the money upon borough objects. It was said that these were not in the nature of "profits" or income at all, and that they would not be taxable. It was a mere dictum; but the Lord President thought that it was right, and with reference to the Glasgow case, he said, construing the Glasgow Acts, and looking at their provisions, "This is not an income at all, it is not a profit at all, it is not a revenue of the sort which is mentioned. In this particular case," said he, and the other judges too, "it is merely a rate upon the inhabitants of Glasgow which is appropriated for the purpose of doing various things, and is not in the nature of a profit or gain at all." Now, as I said before, I have not looked at the Glasgow Acts and I have no materials before me with reference to that case, and

(1) 2 Court Sess. Cas. 4th Series, 708. (2) Law Rep. 6 Ex. 78, 308.

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therefore I express no opinion as to whether that was a right construction of the effect of the Glasgow Acts or not, but if it was, the principle on which the Court of Session then acted was one with which I am not at all prepared to quarrel. It is not necessary to say whether that decision was right or wrong, but it is certainly in conformity with the dictum which I seem myself to have expressed some years previously; and whether it was right or wrong, it does not apply to the present case.

Now that was the only authority cited or referred to at all in support of the argument for the appellants, and it does not seem to me to be applicable. The consequence is that I quite concur with what has been proposed, namely that, without hearing the counsel for the respondent, your Lordships should dismiss this appeal with costs.

LORD FITZGERALD:—

My Lords, I entirely concur in the judgment which has been announced, and I desire to add a few words.

The principal question for your Lordships' decision seems to me to be whether the sum of £697,964, being the amount of the nett receipts of the appellants for one year and arising out of their corporate estates, constituted "profits received therefrom" within the meaning of No. III. Schedule A of the Income Tax Act of 1842. The statute, it will be observed, does not speak of "profit" received by any particular person or body for their own benefit or that of any other person or body, or of its purpose, or object, or application, but simply of "profits received therefrom," and seems to me to use "profit" in the sense of income acquired from the estate, of whatever character it may be, over and above the costs and expenses of receipt and collection.

It is not unimportant in the particular case before us to look to the constituent parts of the corporate estate of the appellants, which are thus stated. [The noble Lord read paragraph 5 of the case and proceeded:—] It is to be observed that the income embraces, in addition to rates on ships using the docks on the River Mersey and dues on goods imported or exported, also warehouse and quay rents, charges for use of machinery, railway tolls, and rentals of various properties. A portion of this property the

appellants derive from the old corporation of Liverpool; and I apprehend it would not be contested that so much of the income would have been liable in the hands of the old corporation had it remained in their hands: see *Attorney-General* v. *Black* (1). There is nothing to be found in this income in the nature of a district or local rate or of a rate or tax which could be considered as a payment by which the inhabitants of the locality procure for themselves some local benefit. The dues are in effect levied on the whole world coming to the Mersey or to Liverpool, and on those taking advantage of the docks or other property of the appellants. In this respect the case is so distinguishable in its facts from *Glasgow Corporation Water Commissioners* v. *Solicitor of Inland Revenue* (2) that it seems to me unnecessary to consider the authority of that case.

On this question I adopt the language of Sir George Jessel in the Court below, "I have so clear an opinion that I can entertain no doubt whatever;" and of Blackburn J. in *Attorney-General* v. *Black* (3). The remaining questions in the case have been satisfactorily disposed of in the Court of Appeal in accordance with the opinion of the judges as delivered in your Lordships' House in *Mersey Docks* v. *Cameron* (4) and with the principles laid down in that case.

I entirely concur in the decision now announced and in the reasons expressed by the Lord Chancellor and by the noble and learned Lord opposite (Lord Blackburn) for that decision.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals 28th June 1883.

Solicitors for appellants: *Gregory Rowcliffes & Co.* for *A. T. Squarey, Liverpool.*

Solicitor for respondent: *W. H. Melvill.*

(1) Law Rep. 6 Ex. 78, 308.
(2) 2 Court Sess. Cas. 4th Series, 708.
(3) Law Rep. 6 Ex. 309, 310.
(4) 11 H. L. C. 443.

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CANADA, LAW OF — *Province of Quebec—Imprisonment of Debtor—Civil Code of Lower Canada, Art.* 2274—*Consolidated Statutes of Lower Canada, c.* 87, *s.* 12—*Code of Civil Procedure of Lower Canada, Arts.* 766, 1178, *and* 1360—*Right of Appeal—Special Leave of Appeal.*] The general intention of the Canadian Legislature seems to have been that the Civil Code and the Code of Civil Procedure, which latter Code came into force ten months after the former, should stand together and be construed together; *quære*, therefore, whether sect. 1360 of the latter Code repealed not only all laws in force before the passing of either Code, but also all parts of the former Code which touched procedure.—*Held*, that Art. 2274 C. C. should be read as meaning that any debtor imprisoned or held to bail in a cause wherein judgment for a sum of $80 or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property according to the rules and subject to the penalty of imprisonment in certain cases provided in c. 87 of the Consolidated Statutes *until the Code of Civil Procedure comes into force* and *then* in the manner and form specified in the Code of Civil Procedure; the italicized words being interpolated so as to fulfil (see art. 12 of C. C.) the intention of the Legislature and to attain the object for which the article was passed.—Consequently the penalty of a year's imprisonment cannot be imposed on a person refusing to perform the duty prescribed by sect. 766 of the C. C. P., inasmuch as the same is not authorized by any of the provisions of the said Code. As to how he is compellable to perform such duty,—*quære.*—*Held*, that under Art. 1178 C. C. P., no appeal lies as of right from a judgment of the Court of Queen's Bench for Lower Canada in the matter of a penalty of imprisonment.—Special leave of appeal granted on the ground of the importance of the question at issue. Carter *v.* Molson 530

2. —— *Province of Ontario—Railway Company—Canadian Act*, 20 *Vict. c.* 227, *s.* 16—22 *Vict. c.* 124 — *Power to levy Tolls — Reasonableness of Charges.*] *Held*, that the International Bridge Company was under Canadian Act 20 Vict. c. 227, s. 16, entrusted with a general and unqualified power of making bye-laws and regulations as to the use of its bridge and the terms on which it should be used in point of payment; and that there is nothing in sect. 2 of the amending Act (22 Vict. c. 124), when read and construed together with the principal Act, which cuts down that power as to the regulation of the use of the bridge and as to the terms on which it may be used by railway trains.—As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is

CANADA, LAW OF—*continued.*
charged. Canada Southern Railway Company *v.* International Bridge Company - 723

3. —— *Province of Ontario — Rights of the Province — British North America Act*, 1867, *ss.* 102, 109—*Escheats.*] *Held*, that lands in Canada escheated to the Crown for defect of heirs belong to the province in which they are situated, and not to the Dominion.—At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the Crown within the then province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the words "lands, mines, minerals, and royalties," therein including, according to their true construction, royalties in respect of lands, such as escheats. Attorney-General of Ontario *v.* Mercer - - - - 767

—— Bills of exchange - - - 733
See Bill of Exchange.

—— Practice—Appeal - - - 103
See Practice—Privy Council. 1.

CAPE OF GOOD HOPE, LAW OF—*Principal and Agent—Cape of Good Hope Act* 11 *of* 1863, *s.* 2—*Construction of Contract.*] Where a contract between the defendant and E. in terms purported to be one of guarantee or agency, the defendant guaranteeing the sale of E.'s property in whole or by lots at a fixed price, E. giving the defendant a power of attorney to deal with the property as he thinks fit, and agreeing that he should receive any surplus over and above the fixed price as his commission on and recompense for the said guarantee; but the real effect of the transaction was to give E. every right which a vendor could legally claim, and to confer on the defendant every right which a purchaser could legally demand:—*Held*, that the defendant was liable to pay duty on his purchase-money under Act 11 of 1863, sect. 2. Hutton *v.* Lippert - - 309

CAPTURE AND SEIZURE—Ship—Insurance
See Insurance, Marine. [393

CARRIER—Railway company - - 703
See Railway Company.

CASES—*Andrew* v. *Buchanan* (Law Rep. 2 H. L., Sc. 286) considered - - 833
See Mine. 2.

—— *Aspden* v. *Sedden* (Law Rep. 10 Ch. 394) approved - - - - 833
See Mine. 2.

—— *Besant* v. *Wood* (12 Ch. D. 605) commented on - - - - - 420
See Husband and Wife.

—— *Bower* v. *Peate* (1 Q. B. D. 321) commented on - - - - - 443
See Principal and Agent. 1.

—— *Crawford* v. *Field* (2 Court Sess. Cas. 4th Series, 20) distinguished - - 265
See Scotch Law. 7.

—— *Freeman* v. *Cooke* (2 Ex. 654) approved 120
See Queensland, Law of.

CASES—*continued.*

—— *Frog's Creditors* (Mor. 4262) considered 577
See Scotch Law. 8.

—— *Geils* v. *Geils* (1 Macq. 255), followed 43
See Scotch Law. 4.

—— *Henderson* v. *Nimmo* (2 Court Sess. Cas. 2nd Series, 869) distinguished - 265
See Scotch Law. 7.

—— *Hunt* v. *Hunt* (4 D. F. & J. 221; 31 L. J. (Ch.) 161), commented on - 420
See Husband and Wife.

—— *Hunt* v. *Wimbledon Local Board* (4 C. P. D. 48) approved - - - 517
See Local Government Acts. 1.

—— *Loffus* v. *Maw* (3 Giff. 592) disapproved 467
See Contract.

—— *Lolley's Case* (Russ. & Ry. 237) explained 43
See Scotch Law. 4.

—— *McCarthy* v. *De Caix* (2 Russ. & My. 614), dissented from - - - 43
See Scotch Law. 4.

—— *Maghee* v. *McAllister* (3 Ir. (Ch.) 604), affirmed - - - - - 43
See Scotch Law. 4.

—— *Niboyet* v. *Niboyet* (4 P. D. 1) considered 43
See Scotch Law. 4.

—— *Pim* v. *Curell* (6 M. & W. 234) discussed
See Fishery. [135

—— *Pitt* v. *Pitt* (4 Macq. 657) considered - 43
See Scotch Law. 4.

—— *Reynolds* v. *Wheeler* (10 C. B. (N.S.) 561), approved - - - - 733
See Bill of Exchange.

—— *Rowbotham* v. *Wilson* (8 H. L. C. 368) considered - - - - 833
See Mine.

—— *Solway Railway Company* v. *Jackson* (1 Court Sess. Cas. 4th Series, 831) affirmed 265
See Scotch Law. 7.

—— *Steele* v. *McKinlay* (5 App. Cas. 754) distinguished - - - - 733
See Bill of Exchange.

—— *Warrender* v. *Warrender* (2 Cl. & F. 488) followed - - - - 43
See Scotch Law. 4.

CEYLON, LAW OF—*Judgment Debtor—Execution—Ceylon Ordinance No.* 4, 1867, *ss.* 53, 54—*Application to set aside Sale for Irregularity—Rule as to Thirty Days imperative.*] By Ceylon Ordinance No. 4, 1867, sects. 53, 54, any application by a judgment debtor to set aside a sale in execution of immovable property must be made within thirty days, and the absence of the judgment debtor from Ceylon is no excuse for non-compliance with the positive terms of the Ordinance. Sillery *v.* Harmanis - - - - - - 99

CIVIL CODE OF LOWER CANADA, Art. 2274
See Canada, Law of. 1. [530

CIVIL PROCEDURE CODE OF LOWER CANADA, Arts. 766, 1178, 1360 - - 530
See Canada, Law of. 1.

CIVIL PROCEDURE CODE OF MAURITIUS, Art. 174 - - - - 296
See Mauritius, Law of.

CLYDE NAVIGATION—Harbour dues - 865
See Scotch Law. 3.

COLLISION - - - - 549, 559
See Ship. 1, 2.

COLONIAL LAW—Canada - 530, 723, 767
See Canada, Law of. 1, 2, 3.

—— Cape of Good Hope - - - 309
See Cape of Good Hope, Law of.

—— Ceylon - - - - - 99
See Ceylon, Law of.

—— Griqualand West - - - 318
See Griqualand, Law of.

—— Jersey - - - - 304, 542
See Jersey, Law of. 1, 2.

—— Malta - - - - - 106
See Malta, Law of.

—— Mauritius - - - - 296
See Mauritius, Law of.

—— Nova Scotia - - - - 568
See Nova Scotia, Law of.

—— Queensland - - - - 120
See Queensland, Law of.

—— South Australia - - - 314
See South Australia, Law of.

—— Straits Settlement - - - 751
See Straits Settlement, Law of.

—— Victoria - - - - 82
See Victoria, Law of.

COMMON INFORMER—Recovery of penalty—Offences against Crown - - 354
See Penalty.

COMPANY—*Payment of Dividends in "proportion to Shares"—Shares fully and partly paid up—Participation equally in Dividend—Construction of Articles of Association — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), 1*st Schedule, Table A, Reg.* 72; *and Companies Amendment Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 24, *sub-s.* 3.] The capital of a company, incorporated under the Acts of 1862 and 1867, consisted of 60,000 shares of £1; 40,000 were fully paid-up, and 20,000 to the extent of only 5*s.* per share. By the 71st article of association the directors may "declare a dividend to be paid to the members in proportion to their shares." By the definition clauses the word "capital" was declared to mean the capital for the time being of the company, and the word "shares" the shares into which the capital is divided. In a question whether the directors could competently recommend a dividend payable to each shareholder in proportion to the amount paid up upon the shares held by him:—*Held*, affirming the decision of the Court below, that such a declaration of dividend was incompetent, because upon the true construction of the articles of association, read with the Acts of 1862 and 1867, all the shares were entitled to participate equally in dividend, without regard to the amount paid up upon each.—See opinions of the Lords at pp. 74, 77, 99, as to the effect of sub-s. 3, s. 24, of the Companies Amendment Act, 1867. Oakbank Oil Company *v.* Crum - 65

2. —— *Railway Company—Borrowing Powers — Debenture Stock — Mortgages — Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *Part III. —Priority—Debenture Stock "at any time created by the Company."*] Decision of the Court of Appeal settling the priority of various classes of holders of debenture stock and mortgages, affirmed. Fenton *v.* Harrison - - - - 780

COMPENSATION—Damage—Support of surface *See* Mine. 2. [833

—— Scotch railway - - - - 265
See Scotch Law. 7.

COMPOSITION—Secured creditor - - 606
See Bankruptcy.

COMPULSORY PURCHASE—Scotch law—Harbour trustees - - - 623
See Scotch Law. 2.

CONSOLIDATED STATUTES OF LOWER CANADA, c. 87, s. 12 - - - 530
See Canada, Law of. 1.

CONTEMPORANEOUS EXPLANATION—Statute *See* Scotch Law. 3. [658

CONTRACT—*Parol, relating to Interest in Land —Part Performance—Statute of Frauds s.* 4.] An intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate: —*Held*, that there was no contract, and that even if there had been and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.—*Loffus* v. *Maw* (3 Giff. 592) disapproved. Maddison *v.* Alderson - - - 467

—— Husband and wife - - - 420
See Husband and Wife.

—— Urban authority—Not under seal - 517
See Local Government Acts. 1.

CONTRACTOR—Liability of principal - 443
See Principal and Agent. 1.

CORPORATION—Income tax - - 891
See Income Tax.

CO-SURETIES—Indorsers of promissory note 733
See Bill of Exchange.

—— Release of one - - - - 755
See Principal and Surety.

COUNTY RATE—Maintenance of criminal lunatic *See* Lunatic. [339

CRIMINAL LAW—Jersey - - - 304
See Jersey, Law of.

CRIMINAL LUNATIC—Maintenance - 339
See Lunatic.

CROWN—Prerogative—Recovery of penalty 354
See Penalty.

CROWN LANDS—Griqualand - - 318
See Griqualand, Law of.

CUSTOM—Mine—Erection of building - 195
See Mine. 1.

—— Of country—Right to sell flints - 508
See Landlord and Tenant.

CUSTOM HOUSE AGENTS — Infringement of patent - - - - - 5
See Patent. 1.

DEBENTURE STOCK — Priority — Borrowing powers - - - - 780
See Company. 2.

DEBTOR — Imprisonment of — Appeal—Law of Lower Canada - - - 530
See Canada, Law of. 1.

DECEASED PARTNER—Share of - - 822
See Partnership.

DISCOVERY - - - - - 217
See Practice. 3.

DISQUALIFICATION — Legislative assembly — Queensland - - - - 120
* *See* Queensland, Law of.

DIVIDENDS—Payment of—Validity - 65
See Company. 1.

DIVORCE—Scotch divorce—English wife 43
See Scotch Law. 4.

DOMICIL—Law of—Representatives - 82
See Victoria, Law of.

—— Scotch divorce—Validity in England 43
See Scotch Law. 4.

DOMINION OF CANADA—Escheat - 767
See Canada, Law of. 3.

DUES—Harbour—Scotch law - - 658
See Scotch Law. 3.

EJECTMENT—Discovery—Production of documents - - - - 217
See Practice. 3.

ENGLISH WILL—Scotch lands - - 577
See Scotch Law. 8.

ENTAIL—Scotch law—English will - 577
See Scotch Law. 8.

ESCHEAT—Dominion of Canada - - 767
See Canada, Law of. 3.

EVIDENCE—Possession — Judgment in former action - - - - 135
See Fishery.

EXECUTION—Rule to set aside—Ceylon law 99
See Ceylon, Law of.

FACTOR - - - - - 874
See Principal and Agent. 2.

FEU CONTRACT - - - - 265
See Scotch Law. 7.

FIAR—Scotch law—Coal mine - - 641
See Scotch Law. 6.

FISHERY—*Navigable Tidal River—Prescription—Evidence—Judgment in Possessory Suit—Judgment by Default.*] In an action for trespass to a several fishery in a navigable tidal river in Ireland the defendants justified on the ground that the public had the right of fishing. The plaintiff's paper title (if the possession and enjoyment were consistent with it) afforded irresistible ground for a presumption that the fishery was put in defence before Magna Charta. As evidence of possession and user the plaintiff tendered (inter alia) the proceedings and decree in 1687 in a "possessory suit" brought in the Court of Chancery in Ireland by C. (the plaintiff's predecessor in title) against strangers to the present action; by which decree an injunction was awarded to quiet C. and his undertenants in such possession

FISHERY—*continued.*
of their fishing as they had at the time of exhibiting the bill and three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles:—*Held*, that as the decree was a solemn and final adjudication, not collusive, and as it could not have been made except upon proof of unbroken user and enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings and decree were admissible; and that the effect of this evidence (not being met by any counter evidence applicable to the same period) was extremely strong to establish possession and enjoyment of the fishery in the latter part of the 17th century, consistent with the paper title and exclusive of the public.—*Pim* v *Curell* (6 M. & W. 234) discussed.—*Held* also that a judgment obtained by the plaintiff in 1826 in an action against a stranger for trespass by fishing in the locus in quo, in which action the defendant appeared but allowed judgment to go by default of pleading, was evidence in the present action of possession in 1826. The defendants proved that cot-fishing had been carried on in the locus in quo with the knowledge of the plaintiff or his agents and without interruption by them as far back as living memory extended:—*Held* that if the plaintiff's right to a several fishery were once proved the exercise of cot-fishing could not take it away or confer any right on the public; for the public cannot in law prescribe for a profit à pendre in alieno solo, nor acquire any right adversely to the owner under any statute of limitation; and an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be "abandoned." Neill *v.* Duke of Devonshire - - 135

FIXTURES—Buildings for working mine 195
See Mine. 1.

FLINTS—Right to sell - - - 508
See Landlord and Tenant.

FRAUDS, STATUTE OF—Representation influencing conduct - - - 467
See Contract.

GRANT—Monthly pension—"Heirs and successors" - - - - 751
See Straits Settlement, Law of.

GRIQUALAND, LAW OF—*Griqualand West—Indefeasible British Title—Conditions of Grant.*] *Held*, that the plaintiff, who had obtained a judgment from the Land Court of Griqualand West in respect of certain lands, was entitled to the grant of an indefeasible British title thereto under the seal of the province in confirmation of the Presidential grant of the 3rd of December, 1862; and that he was not compellable to accept a title containing conditions not expressed in that grant, and not shewn to be incidents implied therein, nor to be duties or regulations since established concerning lands granted upon the like conditions.—*Held*, further, that he might reasonably object to the clause "that the issue of this title without the express reservation to Government of its rights to all precious stones,

GRIQUALAND, LAW OF—*continued.*
gold, or silver found on or under the surface of the said land shall in no degree prejudice the position of the Government in regard to the same."—*Quære*, whether the Civil Commissioner of the district was the proper officer to be sued in respect of title to lands in his district; but, *held*, that he as respondent could not by such objection defend the judgment which he had obtained or defeat an appeal herefrom. Webb *v.* Wright 318

GUARANTEE - - - - 755
See Principal and Surety.

HARBOUR—Dues leviable - - - 658
See Scotch Law. 3.

—— Trustees of—Lands Clauses Act—Scotch law - - - - - 623
See Scotch Law. 2.

HERITAGE—Conveyance of - - - 853
See Scotch Law. 1.

HIGH PEAK MINE—Custom—Erection of buildings - - - - 195
See Mine. 1.

HIGHWAY—*Repair of—Turnpike Roads ceasing to be such and becoming Main Roads—Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77) *s.* 13.] The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) by sect. 13 enacts that any road which has "between the 31st of December 1870 and the date of this Act ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate." The corporation of the borough of Rochdale was the highway authority of the Rochdale highway area. Under sects. 47-50 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) the obligation to repair all public highways within the area of the "town" was imposed upon the corporation, and the turnpike trustees were forbidden to collect any toll or lay out any money on any road within that area. By a local Act in 1872 the boundaries of the borough were enlarged and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that further portions of turnpike roads were for the first time brought within the area of the borough and within the operation of the Towns Improvement Clauses Act 1847:—*Held*, reversing the decision of the Court of Appeal, that these further portions, being only parts of turnpike roads, had not "ceased to be turnpike roads" and were not to be deemed to be "main roads" within sect. 13 of the Highways and Locomotives (Amendment) Act 1878: and that the county authority were not liable to pay half the expenses of their maintenance. Justices of Lancashire *v.* Mayor, &c., of Rochdale - - - - - 494

HIGHWAY—*continued.*
2. —— *Repair of—Turnpike Roads ceasing to be such since the* 31*st of December* 1870—*Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77) *s.* 13.] The Highways and Locomotives (Amendment) Act 1878 s. 13 provides for the maintenance of roads which have since the 31st of December 1870 ceased to be turnpike roads. A provision in turnpike Acts coming into operation before the 31st of December 1870 that turnpike trustees shall not spend money or levy toll upon certain portions of turnpike roads does not prevent such portions of the roads from being still turnpike roads on the 31st of December 1870, within the meaning of sect. 13 of the Highways and Locomotives (Amendment) Act 1878. So as to an agreement under the Local Government Act 1858 (21 & 22 Vict. c. 98) s. 41, made before the 31st of December 1870 between turnpike trustees and a corporation, under which the turnpikes upon certain portions of turnpike roads were removed and the repair of such portions was undertaken by the corporation:—So *held*, affirming the decision of the Court of Appeal. Justices of West Riding of York *v.* The Queen - 781

HUSBAND AND WIFE—*Contract—Wife's Conveyance—Fines and Recoveries, Act for abolition of (Ireland)* (4 & 5 *Will. c.* 92) *ss.* 68, 71.] A married woman was entitled by an ante-nuptial settlement to a jointure rent-charge after her husband's death secured upon his real estates in Ireland. The wife having left him the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification, and no further steps were taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—*Held*, reversing the decision of the Court of Appeal in Ireland, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4 c. 92 ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her.—*Hunt* v. *Hunt* (4 D. F. & J. 221; 31 L. J. (Ch.) 161) and *Besant* v. *Wood* (12 Ch. D. 605) commented on by the Earl of Selborne L.C. Cahill *v.* Cahill - - 420

—— Scotch law - - - - 43, 678
See Scotch Law. 4, 5.

HYPOTHEC—Law of Jersey - - 542
See Jersey, Law of. 2.

ILLEGAL CONTRACT—Public body - - 623
See Scotch Law. 2

ILLEGAL SEIZURE—Mortgagor in possession
See Mortgage. [285

IMPORTATION—Patented article - - 5
See Patent. 1.

IMPRISONMENT — Debtor — Law of Lower Canada - - - - 530
See Canada, Law of. 1.

INCOME TAX—*Profits of Corporation appropriated by Statute to certain purposes*—5 & 6 *Vict. c.* 35, *s.* 60, *Sch. A. No. III.*] A corporation was constituted for the management of the Mersey Dock estate by an Act which provided that the moneys to be received by them from their dock dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; and that after such extinguishment the rates should be reduced; and that except as aforesaid the moneys should not be applied for any other purpose whatsoever; and that nothing should affect their liability to parochial or local rates:—*Held*, affirming the decision of the Court of Appeal, that under the Income Tax Acts the corporation was liable to income tax in respect of the surplus though applicable to the above-named purposes only. Mersey Dock and Harbour Board *v.* Lucas - - - - 891

INDEFEASIBLE TITLE—Land in Griqualand
See Griqualand, Law of. [318

INDORSEMENT—Promissory note—Co-sureties
See Bill of Exchange. [733

INFORMER — Recovery of penalty — Offence against Crown - - - 354
See Penalty.

INFRINGEMENT—Patent - - 5, 873
See Patent. 1, 2.

—— Patent—Scotch law - - - 873
See Scotch Law. 9.

—— Trade-mark - - - - 15
See Trade-mark.

INJURIOUSLY AFFECTING LANDS — Scotch railway - - - - 265
See Scotch Law. 7.

INSURANCE, MARINE — *Policy — Barratry — Warranty free from Capture and Seizure.*] In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure and the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—*Held*, affirming the decision of the Court of Appeal, that the loss must be imputed to "capture and seizure" and not to the barratry of the master, and that the underwriter was not liable. Cory & Sons *v.* Burr [393

INTENTION OF TESTATOR - - 577
See Scotch Law. 8.

INTERDICT—Restraining action—Compensation
See Scotch Law. 7. [265

INTEREST—Share of partnership - - 822
See Partnership.

INTEREST IN LAND—Contract relating to 467
See Contract.

IRREGULARITY—Ceylon law - - - 99
See Ceylon, Law of.

JERSEY, LAW OF—*Practice—Criminal Cases—Special Leave to appeal—Order in Council of 13th of May*, 1572.] An order of Court directing a defendant to plead to an information (or other analogous proceeding), for libel, and directing that having pleaded he should be tried without a jury, is not a definitive sentence within the meaning of the Order in Council of 13th of May, 1572. Special leave to appeal therefrom refused.—*Quære*, as to granting special leave to appeal in criminal cases in Jersey, or where there has been no definitive sentence. Esnouf *v.* Attorney-General for Jersey - - - - - 304

2. —— *Public Register of Jersey—Registration by Order of Court—Hypothec.*] The legal effect of the registration in the public register of Jersey pursuant to an order of the Royal Court of a marriage contract, is to confer a right of hypothec in respect of its provisions from the date of the said order. Simon *v.* Vernon - - 542

JOINTURE—Release of - - - 420
See Husband and Wife.

JUDGMENT — By default—Evidence in subsequent actions - - - 135
See Fishery.

—— Reference—Law of Mauritius - - 296
See Mauritius, Law of.

JUDGMENT DEBTOR—Ceylon law - - 99
See Ceylon, Law of.

JURISDICTION—Vice-Admiralty Court - 329
See Vice-Admiralty Court.

LANDLORD AND TENANT—*Custom of Country—"Mines and Minerals," whether reservation of includes Flints.*] A farm was let under a written agreement reserving to the landlord "all mines and minerals, sand, quarries of stone, brick earth and gravel pits." A local custom (which, it was suggested, had grown up within the last 30 or 40 years) allowed tenants of such farms, let with a similar reservation, to take away the flints that were turned up in the ordinary course of good husbandry and to sell them for their own benefit. If the flints were not turned up and removed such farms could not be properly cultivated:—*Held*, affirming the decision of the Court of Appeal, that the custom was reasonable and valid; and when read into the written agreement was not inconsistent with the reservation, even assuming (but without deciding) that the reservation of "mines and minerals" included such flints. Tucker *v.* Linger - - - - - - 508

LANDS CLAUSES ACT—Scotland - - 623
See Scotch Law. 2.

LEASE OF MINES—Nova Scotia - - 568
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LEAVE TO APPEAL—Law of Lower Canada 530
See Canada, Law of. 1.

—— Privy Council - - - 103, 574
See Practice. 1, 2.

—— Privy Council—Criminal law - - 304
See Jersey, Law of. 1.

LEGISLATIVE ASSEMBLY — Queensland—Disqualification - - - - 120
See Queensland, Law of.

LEX DOMICILII—Personal assets of testator 82
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LEX LOCI—Personal assets of testator - 82
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LIABILITY—Principal for act of contractor 443
See Principal and Agent. 1.

LIFE RENTER—Scotch law—Coal mine - 641
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LOCAL AUTHORITY—Contract with - 517
See Local Government Acts. 1.

LOCAL GOVERNMENT ACTS — *Contract not under Seal but executed—Urban Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.] Sub-s. 1 of sect. 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that "every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority," is obligatory and not merely directory, and applies to an executed contract of which the urban authority have had the full benefit and enjoyment, and which has been effected by their agent duly appointed under their common seal.—*Hunt* v. *Wimbledon Local Board* (4 C. P. D. 48) approved. Young *v.* Mayor, &c., of Leamington Spa - - - - 517

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Urban Authority—New Street, Level, Width and Construction of — Bye-laws under s.* 157.] The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157, enables an urban authority to make bye-laws with respect (inter alia) to the level, width and construction of new streets:—*Held*, affirming the decision of the Court of Appeal, that the words "new streets" in that section are not confined to streets constructed for the first time, but apply also to an old highway, formerly a country lane, which has long been a "street" within the interpretation clause (sect. 4) of that Act, and which by the building of houses on each side of it has recently become a street in the popular sense of the term.—A bye-law made by an urban authority under that section provided that every new street should be laid out and formed of such width and at such level as the urban authority should in each case determine:—*Held*, reversing the decision of the Court of Appeal, that "width" in s. 157 of the Public Health Act, 1875, and in the above bye-law meant width of roadway, and not width between houses on each side of the street; and that the urban authority were not entitled under the above bye-law (or any other of their existing by-laws) to disapprove of and pull down houses in the course of erection in a new street on the ground that the building line was too near the roadway. Robinson *v.* Local Board of Barton-Eccles - 798

LOWER CANADA—Law of - - - 530
See Canada, Law of. 1.

LUNATIC—*Criminal Lunatic, Maintenance of—Prisoner, Maintenance of* — 3 & 4 *Vict. c.* 54, *s.* 2 — 27 & 28 *Vict. c.* 29, *s.* 2 — *Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4, 57.] When a pauper prisoner without a settlement becomes insane during confinement in a prison to which the Prison Act, 1877 (40 & 41 Vict. c. 21) applies, the expenses of inquiring into his insanity and of removing him to a county lunatic asylum and of his maintenance in such asylum during the currency of his sentence are, by sects. 4 and 57 of that Act, to be defrayed out of moneys provided by Parliament; and the effect of those sections is to repeal the provisions of 3 & 4 Vict. c. 54, s. 2, which made the county liable.—So *held*, reversing the decision of the Court of Appeal. Mews *v.* The Queen - - - - - 339

MAINTENANCE—Criminal lunatic - 339
See Lunatic.

MALTA, LAW OF—*Construction of Deed—Primogenitura.*] The general rule governing the succession to a primogenitura is that line is to be considered in the first place, degree in the second, sex in the third, and age in the fourth. A prescribed deviation therefrom must not be construed as interfering therewith more than is necessary to give effect to the deviation.—The deed of foundation of a primogenitura prescribed that sex should be preferred to line and degree, and gave certain powers of nomination. Under clause 3, which directed that in the events which happened the succession should go "ad unum e masculis descendentibus a feminis de eadem linea masculina;" N. succeeded. The clause further provided that in subsequent successions the order of line should be, the direct before the collateral, the nearer collateral before the more remote.—The deed contained also the following clause:—5. "Quod quilibet possessor pro tempore præsentis primogenituræ, si fuerit masculus, possit nominare et eligere suum immediatum successorem aliquem vel aliquam ex vocatis in præsenti instrumento ad sui libitum, etiam si sit sibi magis remotus vel remota, vel minor natu, dummodo non pervertat ordinem vocationis et prælationis superius præscriptum; et non facta hujusmodi nominatione et electione censeatur semper nominatus magis proximus ultimo possessori pro tempore in gradu naturæ, et in paritate gradus major ætate."—On the death in 1875 of N., without issue, the succession opened.—In a suit by the respondent, the son (born 1834) of N.'s youngest sister claiming as nearest in degree of nature; the appellant, the grandson (born 1861) of an elder sister of N. contended that he was entitled by priority of line:—*Held*, that the appellant was entitled.—The devolution of the primogenitura in the absence of nomination must be ascertained by construing clause 5 relatively to the power of nomination given thereby, which merely enables the possessor to regulate the order of succession within the prescribed order of lines. Priority of line is always to be regarded, and in the absence of nomination priority in degree, and then in age must also be attended to. Strickland *v.* Apap [106

MARRIED WOMAN — Agreement to release jointure - - - - 420
See Husband and Wife.

—— Scotch law - - - - 43, 678
See Scotch Law. 4. 5.

MARRIED WOMEN'S PROPERTY ACT (SCOTLAND) - - - - 678
See Scotch Law. 5.

MAURITIUS, LAW OF—*Civil Procedure Code, Art. 474—Tierce Opposition—Judgment Creditors claiming under their Debtor are bound by his acts,*] Where accounts between a firm and one of its debtors had been settled by a reference and an award made thereunder, *held*, that the judgment creditors of the firm could not without alleging fraud or collusion in the proceedings on the reference be admitted to impeach the award by way of tierce opposition or otherwise. Although they were not parties to the reference and were hostile to the firm down to judgment, yet by virtue of the judgment they derived rights under a party to the reference within the meaning of Art. 474 of the Code de Procédure Civile. Martin *v.* Boulanger [296

MAXIM—"Quicquid plantatur solo solo cedit"
See Mine. 1. [195

MEMORANDUM—Opening of the Royal Courts of Justice - - - - 1

METROPOLIS MANAGEMENT ACTS, 1855—18 & 19 *Vict. c.* 120), *ss.* 96, 105, 250, *and* 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*New Street carried over Railway by Bridge—Owner of Land bounding or abutting on New Street—Railway below Level of New Street.*] A railway line ran in a deep cutting much below the level of a highway, which was carried over the railway (nearly at right angles) by a bridge built by the railway company under statutory powers and in pursuance of sects. 46–51 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20). The parapets of the bridge consisted of two walls resting upon arches which had their foundations (outside the lines of the roadway) in the railway company's land. The walls were not used by the company otherwise than as fences for the bridge. The district board of works having paved the highway, which was admitted to be a new street within sect. 105 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120):—*Held* by Lords Blackburn, Watson, and FitzGerald, reversing the decision of the Court of Appeal, that, assuming the fence walls to be the railway company's land, the company were not "owners of land bounding or abutting on" the highway within sect. 77 of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102), and were not liable as owners of the fence walls to contribute to the expenses of paving.—*Held*, also, by Lords Blackburn and Watson, that the railway line and slopes being much below the level of the highway, the company were not in respect of such line and slopes "owners of land bounding or abutting on" the highway within the above section, and were not liable as owners of the line and slopes to contribute to the expenses of paving. Great Eastern Railway Company *v.* Hackney District Board of Works - - - 687

MINE—*High Peak Mining Customs and Mineral Courts Act*, 1851 (14 & 15 *Vict. c. xciv.*)—*Fixtures—Maxim "quicquid plantatur solo solo cedit."*] Miners working under customs established by the High Peak Mining Customs and Minerals Courts Act 1851 (14 & 15 Vict. c. xciv.) lawfully erected machinery and buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance, which would not amount to a destruction, of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to shew that the property in them was intended to be irrevocably annexed to the soil:—*Held*, that the maxim "quicquid plantatur solo solo cedit," was not applicable, and that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and were not liable to the surface owners for so doing. Wake *v.* Hall - - 195

2. —— *Inherent Right of the Surface Owner to necessary Support—Express Obligation to pay Compensation for Damage done by "the foresaid Operations:" Meaning of—Construction of Titles.*] If the owner of a piece of land sells the surface and reserves the minerals below it, with power to get them, he must, if he intends to have the power of destroying or letting down the surface by subsidence in getting them, frame his power in such language that the Court may be able to say from the titles that such was clearly the intention of the parties.—A. was the owner of 500 acres of land. He, in 1800, feued the whole coal, &c., therein to B. with full power to work and win the same, and for that purpose to set down pits, &c., but expressly providing that B. should not be at liberty to sink pits, or break the surface of the land lying on the north of a certain line: with full power, however, to work the coal there, provided it was done from pits situate on the south of the line, without breaking the surface of the land on the north; but for the "whole damage and injury occasioned by the foresaid operations," A. and his successors "shall be completely paid and indemnified by" B. In 1801 A., by disposition and sale, conveyed to C.'s predecessor all his right and title in a parcel of land situate on the north of the line, reserving to himself and his feuars the liberty to take the coal, substantially in the terms given above, and providing that the persons carrying on these operations were to be liable to C.'s predecessor "for the whole damage thereby occasioned:" declaring that the rules contained in the above feu right should be the rule of settlement between C.'s predecessor and B. In 1799 A. had feued to another predecessor of C. a parcel of land contiguous to the above and also to the north of the line, under rererration of the minerals, and with liberty to work the same "so as not to break the surface of the said lands or injure the springs therein upon payment to" C.'s predecessors "any damage that may be occasioned to the said lands by the working of the minerals." B. claimed an absolute right to work out the whole of the coal, under the obligation to pay C. a money compensation for any damage done to the surface:—*Held*, affirming the decision of the Court below, that there was nothing in the titles of the parties which had the effect of taking away or derogating from the common law right of the owner of the surface to insist that the owner of the minerals shall leave sufficient supports to sustain the surface uninjured; and that

MINE—*continued.*
the provision as to payment of compensation clearly meant payment of compensation for damage done by accident or negligence.—The rule established in *Rowbotham* v. *Wilson* (8 H. L. 348) and *Andrew* v. *Buchanan* (Law Rep. 2 H. L., Sc. 286) cited. *Aspden* v. *Seddon* (Law Rep. 10 Ch. App. 394) approved but distinguished. Dixon *v.* White [833

—— Custom of country—Selling flints - 508
See Landlord and Tenant.

—— Nova Scotia—Lease of gold mine - 568
See Nova Scotia, Law of.

—— Scotch law—Right to profits - - 641
See Scotch Law. 6.

MORTGAGE—*Trespass—Mortgagor in Possession—Default in Payment on Demand—Damages for Illegal Seizure.*] Where by the terms of a mortgage deed the plaintiffs were to remain in possession on their own account, and manage the mortgaged property until they should make default in payment of the mortgage money upon demand in writing in manner specified, and such demand was made on the wife of one of the plaintiffs during the plaintiffs' absence by a person who represented himself as the defendant's agent, and upon non-payment the defendant forthwith entered upon possession and seized the mortgaged property:—*Held*, in an action of trespass against the mortgagee, that such non-payment before the plaintiffs had had any opportunity to inquire into the truth of the alleged agency did not constitute default, and that the defendant was liable to the mortgagors in substantial damages. Moore *v.* Shelley [285

NARROW CHANNEL—Sailing rules - 549
See Ship. 1.

NAVIGABLE RIVER—Fishery - - 135
See Fishery.

NEW STREET—Paving expenses - - 687
See Metropolis Management Acts.

—— Width of - - - - - 798
See Local Government Acts. 2.

NOTICE—Undisclosed principal - - 874
See Principal and Agent. 2.

NOVA SCOTIA, LAW OF—*Nova Scotia Revised Statutes, 4th Series, c. 9—Right to lease—Priority of Application.*] Nova Scotia Revised Statutes 4th Series, c. 9, contemplates the grant of both licenses and leases in all districts whether proclaimed or unproclaimed. The first applicant, whether for a license or a lease, is entitled. Applications must be made in writing to the Commissioner or Deputy-Commissioner. A licensee is entitled to a lease under sect. 42. "Occupying and staking off" is not a condition precedent to all leases in an unproclaimed district. Mott *v.* Lockhart - - - - - - 568

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ORDER IN COUNCIL, 27 JUNE, 1832 - 329
See Vice-Admiralty Court.

OWNER—Assessment to poor-rates - 386
See Poor-rate.

PAROL CONTRACT—Relating to land - 467
See Contract.

PART PERFORMANCE—Parol contract relating to land - - - - - 467
See Contract.

PARTNERSHIP—*Construction of Articles—Paying out Deceased Partner's Share—Interest thereon how paid.*] A deed of partnership provided that in the event of the death of any of the partners, and in the event of the surviving partners electing to continue the business, the amount at the credit of the deceasing partner as at the last balance "shall be paid out to his representative by instalments of equal amount at six, twelve, &c., up to sixty months' date," "from the date of the surviving partners declaring their election," "with interest thereon from the date of the balance."—The chief partner, whose interest was about £394,340 in the concern, died. The surviving partners having elected to continue the business, sought to pay his representative by ten equal instalments, with interest on the amount of each instalment from substantially the date of the death to the date of payment. In a claim by the deceased partner's representative that interest should be added to each instalment on the balance of the capital sum remaining unpaid at the date of the payment of each such instalment; thus reaping an advantage of about £2365 from the earlier payment of the larger sums of interest:—*Held* (Lord Watson dissenting), affirming the decision of the Court below, that the interest to be paid with each instalment was interest calculated upon the balance of the capital sum unpaid at that date, and not interest upon the amount of each instalment. Orr Ewing & Co. *v.* Orr Ewing - - - - 822

PATENT—*Infringement—User or Exercise—Importation and transshipment of patented Article—Custom House Agents.*] A patent was granted in England for an invention rendering nitro-glycerine less dangerous. Foreigners imported into England an article compounded of nitro-glycerine and other substances which they had manufactured abroad according to the patent process. The respondents, acting as Custom House agents for the importers, passed the article through the Custom House, and obtained permission (as required by the Explosives Act 1875) for landing and storing it in magazines belonging to the importers:—*Held*, affirming the decision of the Court of Appeal, that the respondents being only Custom House agents for the importers, and not themselves the importers, and having neither possession of nor control over the goods, their acts did not amount to an exercise or user of the patent, and that no action could be maintained against them for an infringement of the patent. Nobel's Explosives Company *v.* Jones, Scott & Co. - - - - - 5

—— Infringement—Scotch law - - 873
See Scotch Law. 9.

PAYMENT OF DIVIDENDS—Validity - 65
See Company. 1.

PAYMENT ON DEMAND—Mortgagor in possession - - - - - 285
See Mortgage.

PENALTY—*Common Informer—Prerogative of Crown—Parliamentary Oaths Act*, 1866 (29 & 30 *Vict. c.* 19), *s.* 5.] Where a penalty is created by

PENALTY—*continued.*
statute and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it.—To enable a common informer to maintain an action for a penalty created by statute, an interest in the penalty must be given to him by express words or by sufficient implication.—The penalty of £500, "to be recovered by action in one of Her Majesty's Superior Courts at Westminster," which is imposed by the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5, upon any Member of the House of Commons voting as such in the House or sitting during any debate after the Speaker has been chosen without having made and subscribed the oath thereby appointed, cannot be recovered in an action by a common informer, and can be sued for only by the Crown: —So *held*, reversing the decision of the Court of Appeal (Lord Blackburn dissenting). Bradlaugh *v.* Clarke - - - - 354

—— Unqualified person acting as solicitor 407
See Solicitor.

PLEADING—Action for recovery of land—Defence - - - - - - 456
See Practice. 4.

—— Action on guarantee - - - - 755
See Principal and Surety.

POLICY—Marine insurance - - - - 393
See Insurance, Marine.

POOR-RATE—*Owner rated instead of Occupier under "Sturges Bourne's Act,"* 59 *Geo.* 3, *c.* 12, *s.* 19.] The owner of a house let "on any agreement by which the rent is reserved or made payable at any shorter period than three months," cannot be assessed to the poor-rates instead of the actual occupier under Sturges Bourne's Act (59 Geo. 3, c. 12), s. 19, if the rent is at a rate which amounts to more than £20 by the year:—So *held*, affirming the decision of the Court of Appeal. Churchwardens, &c., of West Ham *v.* Iles - - - - - - - 386

PRACTICE—*Privy Council—Special Leave to appeal.*] Their Lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.—Petition for special leave to appeal refused, the case depending on a disputed matter of fact whether there had been a gift or sale of certain goods of the value of £1000. Prince *v.* Gagnon - - - - 103

2. —— *Privy Council—Special Leave to appeal.*] Petition for special leave to appeal in a case involving only an issue of fact refused.—Such petition must state fully but succinctly the grounds upon which it is based; the record not being before their Lordships until forwarded by the proper authorities. Canada Central Railway Company *v.* Murray - - - 574

3. —— *Supreme Court—Discovery—Interrogatories—Affidavit of Documents—Ejectment—Action for Recovery of Land.*] In an action for the recovery of land the plaintiff is entitled to discovery as to all matters relevant to his own and not to the defendant's case.—In an action for the recovery of land the plaintiff claimed as assignee of co-heiresses of a deceased intestate owner of the land, and the defendant relied on his possession and also set up the Statute of Limitations:—*Held*, reversing the decision of the Court of Appeal, that the plaintiff was entitled to interrogate the defendant as to matters relevant to the pedigree and heirship of his assignors and as to alleged admissions by the defendant that his possession of the land was as trustee for the intestate and her heirs, even though the plaintiff might have other means of proving the facts inquired after; and that the defendant must answer the interrogatories in substance subject to any privilege against particular discovery which he might be entitled to claim.—*Held*, also, that the defendant must file a proper affidavit of documents. Lyell *v.* Kennedy - - - - 217

4. —— *Supreme Court—Pleading—Action for Recovery of Land—Rules of Court*, 1875, *Order xix., rr.* 15, 17.] In an action for the recovery of land a statement of defence alleging that the defendant is in possession operates (by virtue of Order xix. rule 15 of the Rules of Court, 1875) as a denial of the allegations in the plaintiff's statement of claim, and requires the plaintiff to prove them.—So *held*, affirming the decision of the Court of Appeal. Danford *v.* McAnulty - 456

—— Admiralty—Jurisdiction of Vice-Admiralty Court - - - - 329
See Vice-Admiralty Court.

—— Criminal law—Jersey - - - 304
See Jersey, Law of. 1.

—— Privy Council—Leave to appeal - 304
See Jersey, Law of. 2.

PREROGATIVE OF CROWN - - 354
See Penalty.

PRESCRIPTION—Fishery - - - 135
See Fishery.

PRIMOGENITURE—Law of Malta - 106
See Malta, Law of.

PRINCIPAL AND AGENT *or Contractor—Liability of Principal for act of Contractor—Liability of adjoining Landowners.*] The appellant and respondent were owners of adjoining houses between which was a party-wall, the property of both. The appellant's house also adjoined B.'s house and between them was a party-wall. The appellant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party-wall between it and the respondent's house, so that if one fell the other would be damaged. In the course of the rebuilding the builder's workmen in fixing a staircase, negligently and without the knowledge of the appellant, cut into the party-wall between the appellant's house and B.'s house, in consequence of which the appellant's house fell, and the fall dragged over the party-wall between it and the respondent's house and injured the respondent's house. The cutting into the party-wall was not authorized by the contract between the appellant and his builder:—*Held*, affirming the decision of the Court of Appeal, that the law

PRINCIPAL AND AGENT—*continued.*

cast a duty upon the appellant to see that reasonable care and skill were exercised in those operations which involved a use of the party-wall belonging to himself and the respondent, exposing it to the risk above-mentioned; and that the appellant could not get rid of responsibility by delegating the performance to a third person; and was liable to the respondent for the injury to his house.—*Bower* v. *Peate* (1 Q. B. D. 321) commented on. Hughes *v.* Percival - - 443

2. —— *Undisclosed Principal—Privity of Contract between Principal and Consignee—Money had and received—Notice or Knowledge—Set-off—Factors Act* (6 *Geo.* 4, *c.* 94), *s.* 1.] Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—*Held*, affirming the decision of the Court of Appeal, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything except the premiums, stamps and commission in respect of the insurance.—*Held* also by Lord Blackburn, that the case fell within the Factors Act (6 Geo. 4 c. 94) s. 1.—Sed *quære* by Lord FitzGerald. Mildred *v.* Maspons - - - - - 874

—— Privity of contract—Shipowners—Charterer
See Queensland, Law of. [120

—— Agent for sale—Duty on purchase-money
See Cape of Good Hope, Law of. [309

PRINCIPAL AND SURETY—*Co-Sureties in Severalty—Release—Pleading.*] Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must shew an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release.—*Held*, in an action upon a guarantee, that a plea to the effect that M. was the defendant's co-surety, and had been released in consideration of a new guarantee given to the plaintiff, constituted no defence: the plea nowhere averring or implying that the liability was joint, or that the defendant became surety on the faith of M.'s co-suretyship, or that any right of contribution had arisen against M. which had been taken away or injuriously affected, or that the defendant had suffered any damage or injury by the substitution described. Ward *v.* National Bank of New Zealand - - - 755

PRINCIPAL AND SURETY—*continued.*

—— Contribution—Indorsers of promissory note
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PRIVY COUNCIL—Leave to appeal 103, 574
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PROBATE—Obtaining by unqualified person 407
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PROBATE DUTY—Law of Victoria - 82
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PRODUCTION OF DOCUMENTS - - 217
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PROFITS—Income tax - - - 891
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PROOF—Bankruptcy—Secured creditor - 606
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PROVINCE OF CANADA—Escheat - - 767
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PURCHASE-MONEY—Duty on - - 309
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QUEENSLAND, LAW OF—*Queensland Constitution Act of* 1867, *ss.* 6, 7—*Principal and Agent—Estoppel.*] In an action to recover penalties against the defendant for having contrary to the Queensland Constitution Act of 1867 sat in the Legislative Assembly as a member thereof and voted therein; it appeared that M., M., & Co. had in 1878 "for and on behalf of the owners of the ship *S. H.*" but contrary to the express direction of the defendant (one of such owners), concluded a charterparty with the local Government; that such charterparty was made in pursuance of an agreement between M., M., & Co. and the Government to supply ships of a particular description to carry emigrants, which agreement did not provide for any privity of contract between the owners of such ships and the Government; that M., M., & Co., were the general agents of the defendant to charter ships in which he held shares, and that one of the firm was registered as managing owner of *S. H.*; and that it was neither alleged nor proved that the Government ever knew that M., M., & Co. or any member of that firm had general authority to bind the defendant, and had acted upon the belief that such general authority continued unrestricted:—*Held*, that under such circumstances the Government could not have held the defendant bound to them, and consequently that he was not disqualified under the Act.—*Freeman* v. *Cooke* (2 Ex. 654) approved.—*Quære*, whether in the absence of any notice to the Government of such special restriction, the general authority of the agent if known to the Government would have sufficed to bind the defendant so as to disqualify him under the Act.—*Quære*, also, as to the meaning of "presume to sit and vote" in sect. 7 of the Act, and as to what knowledge by a member of his disqualification is implied thereby. Miles *v.* McIlwraith - 120

RAILWAY—Bridge over—Paving expenses 687
See Metropolis Management Acts.

RAILWAY COMPANY—*Carrier—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Alternative Rates.*] A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market:—*Held*, reversing the decision of the Court of Appeal, that upon the facts the merchant had a bonâ fide option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and and reasonable within the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) s. 7, and covered the delay; and that the company were not liable for the loss. Manchester, Sheffield and Lincolnshire Railway Co. *v.* Brown 703

—— Canada—Power to levy tolls - - 723
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—— Scotch law - - - - 265
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RATE—Owner rated instead of occupier - 386
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REASONABLENESS OF CHARGES—Railway tolls—Canada - - - 723
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SCOTCH LAW—*Conveyance of Heritage—Mid-superiority—Meaning of Clause "All other lands and others," following and concluding a Specific Enumeration and Description of Separate Subjects—When Reference to prior Letters to control Language of Dispositive Clause not allowed—Ambiguity.*] According to the Law of Scotland the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract in toto, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties; and a reference to an antecedent agreement is not warranted either by the fact that the subjects conveyed are described in general terms in the dispositive clause of the deed, or by the fact that, in the narrative of the deed, the parties are represented as having agreed upon certain points, which were presumably matters of stipulation, in any written agreement which preceded its execution. Although subsidiary clauses of a deed may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause, yet if the terms of the dispositive clause are per se sufficient to give a right, they cannot be controlled by a reference to the other clauses of the disposition. Where one of a set of heads in the dispositive clause of a disposition is expressed in general terms and concludes a specific enumeration and description of separate subjects, primâ facie, and unless the contrary appear, it must be presumed that it was merely intended to carry rights ejusdem generis with those previously described and disponed. A completed disposition, dated 1879, and made inter alia by A. in favour of B. of certain superiorities, proceeded on the narrative that it was granted in consideration of an agreement between the parties. It conveyed to B. the dominium directum of separate parcels of land by five clauses. Of the land described in four the dominium utile had been conveyed by A. and his predecessors at various dates before 1873 out and out to the G. and S. W. Railway Company. None of these conveyances was of the nature of a feu right, and no mid-superiority was thereby created, and consequently the railway company held the lands thereby disponed (sect. 126 Lands Clauses Consolidation (Scotland) Act, 1845), under those who were the immediate superiors at the dates of the several conveyances in their favour. The 5th clause was, inter alia, in these terms: "And all other lands and others in the county of Ayr, parts of the said estates of Balloch-myle, ... and have been disponed by me," &c., to the said G. and S. W. Railway Company. In 1878 A. had disponed an acre of land to the same railway for a reservoir, together with the servitude right of conveying water from it by means of pipes through his intervening lands to the railway station. That deed declares that the said acre of land and servitude are to be holden

of the disponer in feu farm fee and heritage for ever; and the lands thus feued are described as parts of "all and whole the lands and tenandry of Ballochmyle and others, being the lands and others particularly described in a writ of clare constat granted by A. in favour of himself in 1864." In 1863 A. had completed his title as superior under the Crown of "all and whole the lands and tenandry of Ballochmyle." In 1864 he made up a feudal title to the dominium utile of these lands by obtaining from himself, as his own immediate superior, the writ of clare referred to. These several estates of superiority and fee remain vested in A. under separate titles. The effect, therefore, of the feu-disposition of 1878 was to split the dominium utile of the acre of ground and its accompanying servitude rights, as vested in A. by the writ of 1864 into two estates; one an estate of fee belonging to the railway company, and the other a subordinate (yet independent) estate of superiority, belonging to A., interposed between his vassal's estate of fee and his own estate of superiority under the Crown. B., under the above 5th clause, claimed the mid-superiority of the acre of ground feued in 1878 to the railway company. A. adduced proof to shew that the land in question was misdescribed in the deed of 1878, that it did not "belong to the lands and tenandry of Ballochmyle," but was part and parcel of other lands; he also sought to refer to previous letters to shew what the contract was:—*Held*, affirming the judgment of the Court below, but not on the same reasoning, that the evidence was not sufficient to discredit the description of the lands, the onus probandi being on A.; that there was not in the dispositive clause any ambiguity of expression such as to necessitate or justify a reference to the other clauses of the deed or to the previous letters for aid in its interpretation; but the terms of that clause did not sustain the claim made by B. Lee *v.* Alexander - - - - **853**

2. —— *Harbour Trustees—Compulsory Purchase of Land—Powers under Special Act—Compensation—Invalidity of Agreement purporting to restrain Powers over Land taken—Lands Clauses Consolidation (Scotland) Act*, 1845, *ss.* 48 *and* 61.] Where the legislature confer powers on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good; and a contract purporting to bind such a body and their successors not to use those powers is void. Harbour trustees, constituted for the management and improvement of a public harbour by a special Act, which incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, were empowered to take lands scheduled (which included that part of O.'s land having an unrestricted frontage to the harbour) for the undertaking. While the question of compensation to O. for his land was before the arbiter the trustees lodged a minute agreeing that the conveyance should restrict their use of the ground taken so as not to intefere with the access from the remaining property of O. to the harbour. To this minute O. did not assent. The arbiter found £4900 payable by the trustees as compensation for an unrestricted use, or £2786 if it were competent for the trustees to bind themselves and their successors by the above-mentioned minute. O. raised an action for declarator of an absolute purchase and unrestricted right in the subject, and for payment of the larger sum:—*Held*, affirming the decision of the Court below, that the trustees had power under their special Act, now or at any future time, to make erections on the piece of ground taken, which would effectually destroy the frontage of O.'s remaining property to the harbour; secondly, it was not competent to the trustees to dispense with future exercise of their powers by themselves and their successors.—*Per* Lord Blackburn: If the trustees could bind themselves and their successors by the agreement, and that agreement would prevent O.'s land from being injuriously affected, O., by refusing his assent, could not get compensation for the injury he might have prevented. Ayr Harbour Trustees *v.* Oswald - - - - **623**

3. —— *Harbour — Dues leviable — Timber floated in Chains—Usage and contemporanea expositio—The Clyde Navigation Consolidation Act*, 1858 (21 *&* 22 *Vict. c.* 149), *ss.* 98, 99, *Sched. H.*] Where a statute gave trustees appointed for the improvement of a navigable river and harbour power to charge dues on all timber "shipped or unshipped within the harbour or river":—*Held*, that, to attach a tow-rope to a log of timber or a number of logs loosely connected at one of the ends for the purpose of towing them, is not to "ship" those logs, and that to cast off the tow-rope is not to "unship" them.—*Query*, whether a raft of logs so constructed as to be capable of being navigated can be said to be "unshipped" when on reaching its destination it is taken to pieces and landed.—By an Act dated 1770, the Clyde trustees had power to charge rates on "all timber or wood either carried in boats or other vessels, or floated in and upon the said River Clyde within those points aforesaid" (that is above Dumbuck). By a statute in 1840 the Clyde trustees' jurisdiction was extended down the river to Newark Castle, and the duties were imposed by that Act on "all goods carried or conveyed on the river." By the statute in force at present, dated 1858, all the prior Acts are totally repealed. By sect. 75 the limits of the river is to include the whole channel or waterway forming the harbour, and the whole works within certain given limits, and the whole lands acquired for the purposes of such works, or occupied by the trustees in connection with the navigation of the said river. By sect. 98 it is enacted that the trustees are to have power to levy on goods "shipped or unshipped" in the river or harbour the rates specified in the first and second columns of part 1 of Schedule H. Schedule H. is headed "Rates on goods conveyed upon or shipped or unshipped in the river or harbour." In 1876 the trustees under their Act of 1858 sought to levy rates on timber in logs, which were taken out of the vessels importing them from abroad outside the jurisdiction of the trustees, and then floated or towed chained together over the old, shallow

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channel of the river, to storing ponds situate within the trustees' jurisdiction. In a note for suspension and interdict at the instance of the owners:—*Held*, affirming the decision of the Court below, that the word "river" as it occurs in sect. 98 comprehended the whole waters of the Clyde, within the limits defined in sect. 75, and cannot be restricted to those portions of the channel which have been artificially deepened; but that the statute of 1858 confers no authority on the trustees to levy rates on timber towed in the manner mentioned.—See Lords Blackburn (p. 670) and Watson (p. 673) as to the value of contemporanea expositio of an Act so late as 1858. Trustees of Clyde Navigation *v.* Laird 658

4. —— *Husband and Wife — Marriage in England between Scotchman domiciled in Scotland and Englishwoman—Decree of Divorce by Scotch Court, by reason of Husband's Adultery only—Validity of Divorce in England.*] The English Courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.—When an English woman marries a domiciled foreigner, the marriage is constituted according to the lex loci contractus; but she takes his domicil and is subject to his law.—A domiciled Scotchman married, in England, an English woman. Immediately after the ceremony the married couple went to Scotland and resided there as their matrimonial home. Two years after the wife obtained in Scotland a divorce à vinculo matrimonii, on the ground of her husband's adultery only. The husband came to England, and married there another English woman, the first wife being still alive. In a suit for a declaration of the nullity of the first marriage at the instance of the second wife:—*Held*, affirming the decision of the Court below, that the divorce in Scotland was a sentence of a Court of competent jurisdiction, not only effectual within that jurisdiction but entitled to recognition in the Courts of this country also.—*Lolley's Case* (Russ. & Ry. 237) explained; *Warrender* v. *Warrender* (2 Cl. & F. 488); *Geils* v. *Geils* (1 Macq. 255) undistinguishable; *Maghee* v. *M'Allister* (3 Ir. (Ch.) 604) also undistinguishable and affirmed; *M'Carthy* v. *Decaix* (2 Russ. & My. 614) dissented from.—*Query*, Whether a bonâ fide change of domicil which was English at the date of the contract would affect the question of dissolution; and whether *Pitt* v. *Pitt* (4 Macq. 627) would govern cases like *Niboyet* v. *Niboyet* (4 P. D. 1) if they arose in Scotland. Harvey *v.* Farnie - - - - - - - - 43

5. —— *Husband and Wife—Succession to Personalty under Married Women's Property (Scotland) Act*, 1881 (44 & 45 *Vict. c.* 21)—*Applicability of Sect.* 6 *to Marriages entered into before the Act.*] The 6th section of the Married Women's Property (Scotland) Act, 1881, enacts, "After the passing of this Act the husband of any woman

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who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."—A woman, married before the passing of the above cited Act, succeeded to moveable property, some before and some after the date of the Act, which was settled upon her for her personal use, and free from the jus mariti of her husband. She died, without issue, intestate, and domiciled in Scotland. In a claim by A., her husband, against her executrix:—*Held*, affirming the decision of the Court below, that sect. 6 of the Married Women's Property (Scotland) Act, 1881, applies to marriages entered into before the passing of that Act as well as to those contracted after that date; and that, therefore, A. was entitled in accordance with that section to half his wife's personal estate.—Also, that sub-sect. 2 of sect. 3 applies only to the preceding sections. Paterson *v.* Poe - - - - 678

6. —— *Liferent and Fiar—Unworked Coal Mines—Liferentrix not entitled to Profits though opened during her Life—Testator's Intention—Trusts (Scotland) Act*, 1867 (30 & 31 *Vict. c.* 97), *s.* 2, *sub-s.* 3.] A testator directed his trustees to pay to his wife "the whole annual produce and rents of the residue of his estates both heritable and moveable." Coal and iron mines were leased by the testator before his death. His trustees afterwards leased others. In a question whether the wife was entitled to the rents of those opened after the testator's death:—*Held*, affirming the decision of the Court below, that in law she was not entitled; and that there was nothing in the trust deed which shewed that she was to have such a benefit:—Also, the Trusts (Scotland) Act of 1867 was merely an Act to facilitate administration without disturbing the interests of the beneficiaries under the trust, i.e., it enables trustees who also have the testator's authority to let minerals, to let them for the customary period instead of a lease for an uncertain period, namely, a tenancy for life.—Whether the power to let minerals on long leases under sub-sect. 3, sect. 2, of the Act includes a power to open up and let new mineral fields not decided. Campbell *v.* Wardlaw - - - - - - - 641

7. —— *Railway Works—Injuriously affecting Lands—Superior and Vassal—Construction of Feu Contract—Interdict to restrain Action for Compensation—Railways Clauses Consolidation (Scotland) Act*, 1845, *s.* 6—*Exercise of reserved Powers; what not equivalent to.*] In January, 1872, A.'s predecessor in title obtained by feu contract from a superior a building lot situated at the south side of an estate. With the contract was incorporated a plan which shewed the whole estate divided into feuing lots with several streets running east and west; and one street twenty-four feet wide connecting the turnpike road on the north to another road on the south, and forming one side of A.'s feu. The lot was disponed "together with free ish and entry thereto by the streets laid down

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on the said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power was, that "the superior should have full power and liberty to vary and alter the said plan or streets or roads thereon in so far as regards the ground not already feued." In July, 1872, a railway company gave the superior statutory notice that they intended to take a strip of ground running from east to west through the estate. In 1877 they executed the works and, inter alia, cut off all access for carriages by the street marked on the plan running from south to north, twenty-four feet wide. None of A.'s land was taken. In an action by the railway company for interdict against A. taking further proceedings in a claim for compensation in respect that his lands were injuriously affected, under sect. 6 of the Railway Clauses (Scotland) Act, 1845:—*Held*, affirming the decision of the Court below (Earl of Selborne, L.C., doubting), that A. was not entitled to compensation, because, 1, the access in question had not been "opened" in the sense meant in his feu contract before the statutory notice; and 2, there was no obligation in the feu contract cast upon the superior to pursue his feuing scheme, and give the feuars at some future time access along any of the roads or streets marked on the plan: Also—when there is an implied obligation by the superior to prosecute his feuing scheme for the benefit of the feuars, the feuars have a vested interest de futuro in the roads and streets shewn on the feuing plan, sufficient to sustain a claim for compensation under the Railways Clauses Consolidation (Scotland) Act, 1845. The compulsory taking by a railway company, under their statutory powers, of part of a superior's estate, cannot be regarded as equivalent, either in fact or law, to an exercise of a power reserved by the superior himself.—*Solway Railway Company* v. *Jackson* (1 Ct. Sess. Cas. 4th Series, 831) affirmed.—*Henderson* v. *Nimmo and Colquhoun* (2 Ibid. 2nd Series, 869), and *Crawford* v. *Field* (2 Ibid. 4th Series, 20) distinguished. Fleming *v.* Newport Railway Company - - 265

8. —— *Succession — English Will devising English and Scotch Lands in tail male, Effect as to Scotch Heritage — Construction—Intention of Testator—Titles to Land Consolidation (Scotland) Act*, 1868 (31 & 32 *Vict. c.* 101), *ss.* 19, 20.] Where a testator, in a foreign will, expresses himself in technical language of the place where made and where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed.—By the common law of Scotland the actual intention of the maker of any validly executed settlement of moveables received effect when duly ascertained; and now by the Titles to Land Consolidation (Scotland) Act, 1868, the Scotch law—which would previously have rejected as inoperative a foreign will dealing with Scotch lands not executed with all the required formalities; and not expressed in appropriate terms of de presenti conveyance—must, so far as may be practicable with the principles of that law, give effect to the intention as expressed in the will, just the same as if it dealt

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with moveables and not heritage. The technical rule of Scotch law applicable to moveable and immoveable property, that a gift or devise to a parent in liferent, and after his death to his unborn or unnamed children in fee, confers a fee on the parent and a spes successionis only on the children—(*Frog's Creditors*, Mor. 4262)—is excluded by anything in the gift itself, shewing beyond doubt that the intention was to give nothing more than a life interest to the parent. A testator, domiciled in England, who died possessed of lands in England and Scotland, left a will executed according to the forms of English law, by which he devised all his lands as consisted of "freehold of inheritance" to the use of his eldest son. E. F. S., and his assigns for his life "without impeachment of waste," and after the death of E. F. S. to the use of the first and every other son of E. F. S. successively, according to their respective seniorities in tail male, with remainders over. Under a subsequent clause E. F. S. took as residuary legatee all property not otherwise disposed of. Subsequent to the date of the will children were born to E. F. S. He claimed the Scotch estate as vested in him absolutely, or alternatively that the estate belonged to him as residuary legatee or as heir-at-law. This claim was opposed on behalf of his infant children:—*Held*, affirming the decision of the Court below, that under the statute of 1868 the law of Scotland must, so far as practicable, give effect to the intention of the testator, as gathered from the whole context interpreted by English law; and (2) that undoubtedly the intention of the testator was that E. F. S. should take a life interest only; and that of the fee the Scotch estates should go to the eldest son of E. F. S., and the others nominated. (3) That that intention, so far as the separate destination of the liferent and fee of the estate, could be carried out substantially without inconsistency with the practice or policy of the law of Scotland,—the rule being valeat quantum valere potest. (4) That a registrable title fell to be made up in accordance with such intention; but that the technical way in which effect might be given to the intention by the Scotch law was immaterial. See Lord Watson as to the non-vesting of the beneficial fee until the death of the liferenter, p. 602. Studd *v.* Cook - - - 577

9. —— *Patent — Infringement.*] Decision of the Court of Session, Scotland, affirmed. Clippens Oil Co. *v.* Henderson - - - 873

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SHIP — *Admiralty Regulations of the 18th of March*, 1880, *art.* 21—*Narrow Channel—Collision.*] The Strait of Messina is a narrow channel within the meaning of art. 21 of the Admiralty Regulations for preventing Collisions at Sea; as to what particular width or length will constitute a narrow

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channel, *quære.*—*Held*, that the *A. L.* by infringing the said article occasioned the collision which afterwards happened, and failed to establish that the *R.* by anything which she did contributed to it or could in any way have avoided it.—*Held*, that the *R.'s* helm having been put hard aport in a way which if successful would have put her on such a course as would have determined the risk of collision, the duty of reversing her engines did not arise till it was discovered that the vessel, owing to the action of a current, was not obeying her helm. Scicluna *v.* Stevenson. The "Rhondda" - - - - - - 549

2. —— *Salvage Remuneration—Ascertainment of Salvor's Losses.*] Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual.—The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision.—Where a judge had awarded £3500 for losses and £5000 for remuneration (the property saved being £67,000):—*Held*, that a total of £6000 was sufficient. Bird *v.* Gibb. The "De Bay" - - - - - - - 559

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SOLICITOR—*Proctor—Unqualified Person acting as Solicitor or Proctor in obtaining Probate*—6 & 7 *Vict. c.* 73, *s.* 2—23 & 24 *Vict. c.* 127, *s.* 26.] Law stationers, not qualified as solicitors or proctors, were accustomed upon the instruction and in the names of London or country solicitors, to take to the Registry of the Probate Division original wills and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the stationers communicated it to the solicitors. All the charges between solicitor and client were made by the solicitors, and the stationers charged the solicitors for their clerk's time only:—*Held*, affirming the decision of the Court of Appeal, that the stationers had not acted as solicitors or proctors, and were not liable to the penalties imposed by 23 & 24 Vict. c. 27, s. 26. Law Society *v.* Waterlow. Law Society *v.* Skinner - - - 407

SOUTH AUSTRALIA, LAW OF—*South Australian Act* 22 *of* 1861, *s.* 39—*Unregistered Deed may pass an Equitable Right.*] Although an unregistered deed is not effectual to pass any interest in land under s. 39 of Act 22 of 1861, yet it is effectual to pass an equitable right to set aside a certificate of title relating thereto which has been obtained by fraud. McEllister *v.* Biggs - - 314

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6 Geo. 4, c. 94, s. 1—*Factors* - - 874
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59 Geo. 3, c. 12, s. 19—*Poor* - - 386
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4 & 5 Will. 4, c. 92, ss. 68, 91—*Fines and Recoveries* (*Ireland*) - - - 420
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3 & 4 Vict. c. 54, s. 2—*Lunatics* - - 339
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5 & 6 Vict. c. 35, s. 60, Sch. A. No. III. 891
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6 & 7 Vict. c. 73, s. 2—*Solicitors* - - 407
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8 & 9 Vict. c. 19 ss. 48, 61—*Lands Clauses* (*Scotland*) - - - - - 623
See Scotch Law. 2.
8 & 9 Vict. c. 33, s. 6—*Railway Clauses* (*Scotland*) - - - - - 265
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10 & 11 Vict. c. 34, ss. 47-50—*Towns Improvement* - - - - - 494
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14 & 15 Vict. c. xciv. — *High Peak Mining Customs* - - - - 195
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17 & 18 Vict. c. 31, s. 7—*Railway and Canal Traffic* - - - - 703
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17 & 18 Vict. c. 104, s. 189—*Merchant Shipping*
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21 & 22 Vict. c. 98, s. 41—*Local Government*
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22 Vict. c. 124—*Canadian* - - 723
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27 & 28 Vict. c. 29, s. 2—*Criminal Lunatics*
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USER—Patent - - - - -
See Patent. 1.

VICE-ADMIRALTY COURT — *Vice-Admira Jurisdiction—Suit by six Seamen for Wages a Compensation—Orders in Council* (2 *Will.* 4), *s. —Merchant Shipping Act*, 1854, *s.* 189.] By Order in Council, sect. 15, passed in pursuance 2 Will. 4, c. 51, the Vice-Admiralty Court h jurisdiction to entertain a suit brought by a number of seamen, not exceeding six, to recov their wages. The Merchant Shipping Act, 185 sect. 189, does not take away such right of suit long as the total aggregate amount claimed such seamen exceeds £50.—Where in a suit broug by six seamen in the Vice-Admiralty Court, t Judge found that a total amount of £203 19*s.* 8 was due to them, partly for wages and partly f wrongful dismissal, but that the amount due each was less than £50:—*Held*, that under t above rule and section the Judge was wrong dismissing the suit for want of jurisdiction, a that a decree for £203 19*s.* 8*d.* should be mad Phillips *v.* Highland Railway Company. T "Ferret" - - - - - 3
VICTORIA, LAW OF—*Lex Domicilii—Lex L as applied to the Personal Assets of a Testator Victorian Act No.* 388 *of* 1870, *s.* 2, *sub-s.* 7—*P bate Duty.*] Although the law of a testato domicil governs the foreign personal assets of l estate for the purpose of succession and enjoyme yet those assets are, for the purpose of legal rep sentation, of collection and of administration,

VICTORIA, LAW OF—*continued.*
distinguished from distribution among the successors, governed by the law of their own locality and not by that of the testator's domicil.—*Held*, that, according to the true construction and intention of Victorian Act No. 388 of 1870, "The Duties on the Estates of Deceased Persons Statute, 1870," a legal personal representative in Victoria should, as regards the "personal estate" of the deceased mentioned in sect. 2, sub-sect. 7, state accounts only of so much thereof as comes under his control by virtue of his Victorian probate. Blackwood *v.* The Queen - - 82

WAGES OF SEAMEN - - - 329
See Vice-Admiralty Court.

WILL—*Construction of—Specific Legacy—Residuary Bequest.*] A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to E. A. Robertson absolutely. And he gave and devised all the rest, residue and remainder of his estate,

WILL—*continued.*
both real and personal, to his executors upon certain trusts; all the legacies to be free of legacy duty; the legacies for charitable purposes to be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes and preferably to any other payment thereout:—*Held*, affirming the decision of the Court of Appeal, that the legacy to E. A. Robertson was not specific, and not exempt from the payment of the pecuniary legacies. Robertson *v.* Broadbent - - - - - 812

—— Scotch law - - - - 577
See Scotch Law. 8.

WINDING-UP—Building society - - 235
See Building Society.

WITHDRAWAL—Member of building society
See Building Society. [235

WORDS—"All other lands and others" - 853
See Scotch Law. 1.

—— "Foresaid operation" - - - 833
See Mine. 2.

—— "Heirs and successors" - - 751
See Straits Settlement, Law of.

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